The

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II] JULY [1959

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE GANAPATIA PILLAI.

Sri Rama Vilas Service (Private) Ltd., Kumbakonam, by Director, K. A. V. Easwaran .. *Appellant**

v.

Raman and Raman (Private) Ltd., Kumbakonam and another .. *Respondents.*

Motor Vehicles Act (IV of 1939), section 47 (1)—Scope of—Grant of permits under—If amounts to a monopoly—Considerations specified—If exhaustive.

The scheme of the grant of permits under the Motor Vehicles Act involves a monopoly to a certain extent, namely, that on a particular route only the person who has obtained a permit can operate and others cannot. But this is not a monopoly in the strict sense as it is always open to the transport authorities to grant another permit to another operator for the same route and the previous permit-holder cannot complain of any legal injury to his rights.

Though section 47(1) of the Act specifies the several factors that might be taken into consideration by the transport authorities in granting permits it does not exclude the consideration of other matters which are germane to the question to be decided, namely, who among the several applicants is best fitted to be granted a permit. It is open to the authorities to choose one of the applicants in preference to the other or others on the ground that the other who is already holding several permits on the route is likely to abuse his monopoly. Such considerations are not irrelevant in deciding the question as to who should be granted a permit. Such considerations are not hit by Articles 19 (1) (*g*) and 19 (3) of the Constitution.

W. A. No. 55 *of* 1958.—

Appeal under clause 15 of the Letters Patent against the Order of the Hon'ble Mr. Justice Rajagopalan, dated 8th July, 1958 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P. No. 223 of 1958 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records in R. No. 401841/A-1-57, dated 12th March, 1958, on the file of the State Transport Appellate Tribunal, Madras, relating to the grant of a stage carriage permit to the petitioner on the route, Tiruthuraipoondi to Nagapattinam and quash the said order.

W. A. No. 101 *of* 1958.—

Appeal under clause 15 of the Letters Patent against the Order of the Hon'ble Mr Justice Balakrishna Iyer, dated 28th November, 1958 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P. No. 650 of 1958 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records in R. No. 7160-A/1-58, dated 14th August, 1958, on the file of the State Transport Appellate Tribunal, Madras, granting permit to 3rd Respondent

* W.A. Nos. 55 and 101 of 1958.

6th March, 1959.
(15th Phalguna 1880—Saka.)

herein on the route Mayuram to Thiruchitrambalam *via* Manalmedu (C. No. 9956/A-7-57, dated 16th January, 1958) on the file of the Regional Transport Authority, Tanjore, and quash the said order of the 1st Respondent.

M. K. Nambiar for *G. R. Jagadisan* and *K. K. Venugopal*, for Appellant in W.A. No. 55 of 1958.

S. Mohan Kumaramangalam, for 1st Respondent in W.A. No. 55 of 1958.

R. M. Seshadri, for 3rd Respondent in W.A. No. 101 of 1958.

V. Ramaswami, for the Additional Government Pleader (*K. Veeraswami*), for 1st Respondent in W.A. No. 55 of 1958 and for Respondents Nos. 1 and 2 in W.A. No. 101 of 1958.

The Judgment of the Court was delivered by

Rajamannar, C.J.—These two appeals were heard together because they raise a common question of law. One of them is from the judgment of Balakrishna Ayyar, J., and the other from the Judgment of Rajagopalan, J. Before we deal with the several contentions raised at the Bar, it will be useful to set out the facts in each of the two cases. Writ Appeal No. 101 of 1958 from Writ Petition No. 650 of 1958 arises out of applications for the grant of a permit to ply a stage carriage between Mayuram and Thiruchitrambalam. There were five applicants. The Regional Transport Authority followed the system of marking prescribed in G.O. No. 1298, Home, dated 28th April, 1956 and on the basis of the marks secured by the respective applicants, granted the permit to Veerappa Pillai, the proprietor of Sri Sathi Vilas Bus Service who had obtained 4¼ marks. The Sales, Services and Transports (Private) Ltd., Mayuram, another applicant to whom the Regional Transport Authority had awarded 1 mark, filed an appeal to the State Transport Appellate Tribunal. The Appellate Tribunal differing from the Regional Transport Authority, awarded 3¼ marks to Veerappa Pillai and 3 marks to the Sales, Services and Transport (Private) Ltd. Nevertheless the Tribunal allowed the appeal and directed the issue of the permit to the Sales, Services and Transport (Private) Ltd., on the ground that Veerappa Pillai was admittedly the only operator plying three buses on the route for twelve out of sixteen miles, 2 furlongs and so had a monopoly over a major portion of the route and that the grant of another permit to him would further strengthen the monopoly and this would be against public interests. He concluded as follows :

> " I am of opinion that in order that healthy competition may be provided in the interest of the travelling public, the permit should be granted to a third person. I accordingly hold that the mark system works unfairly in the present case, and that ignoring the marks obtained by the respondent (Veerappa Pillai), the permit be granted to the appellant (Sales, Services and Transport (Private) Limited.")

It is against this order that Veerappa Pillai filed Writ Petition No. 650 of 1958 praying that the order of the State Transport Appellate Tribunal may be quashed.

Writ Appeal No. 55 of 1958 from Writ Petition No. 223 of 1958 arises out of applications for the grant of a stage carriage permit on the route from Nagapattinam to Tiruthuraipoondi. There were two applicants, Sri Rama Vilas Service (P.) Ltd., and Raman and Raman (P.) Ltd. The Regional Transport Authority in accordance with G.O. No. 1298, Home, dated 28th April, 1956, awarded Sri Rama Vilas Service (P.) Ltd., 6 marks and Raman and Raman (P.) Ltd., 2½ marks. Sri Rama Vilas Service (P.) Ltd. was granted the permit. There was an appeal by the other applicant to the State Transport Appellate Tribunal who made a different valuation. He awarded Sri Rama Vilas Service (P.) Ltd., 4½ marks and Raman and Raman (P.) Ltd., 1¾ marks. The Tribunal, however, allowed the appeal, set aside the grant of the permit to Sri Rama Vilas Service (P.) Ltd. and directed the grant to Raman and Raman (P.) Ltd. on the ground that Sri Rama Vilas Service (P.) Ltd. was having a monopoly on the route as they were already running four buses on the same route and four more of their buses were plying from Nagapattinam to Pattukottai *via* Thiruthuraipoondi, and for healthy competition and in the interest of the public the permit should be granted to Raman and Raman (P.) Ltd. It was

contended that though Sri Rama Vilas Service (P.) Ltd., were having a monopoly on the route, there was no evidence that they had abused such monopoly and so there was no reason to refuse the permit to them. This contention the Tribunal did not accept. He said :

"I do not agree that it is only if an operator who is having a monopoly on a route has abused it a fresh permit can be refused to him. The danger of the monopoly being abused always is there and when that is so it is certainly not in the public interest in the present case to grant the fifth permit also to the Respondent (Sri Rama Vilas Service (P.) Ltd.) and to further strengthen the monopoly which the respondent is already having over the route. The introduction of a new operator on the route in order to promote healthy competitive service will be more in the interests of the public. For these reasons I hold that this is a case where the marks obtained have to be ignored and the permit should be granted to the applicant (Raman and Raman (P.) Ltd.).

To quash this order of the Appellate Tribunal, Rama Vilas Service (P.) Ltd. filed Writ Petition No. 223 of 1956.

Balakrishna Ayyar, J., who heard W.P. No. 650 of 1957, and Rajagopalan, J. who dealt with Writ Petition No. 223 of 1958 both dismissed the respective petitions before them. The learned Judges held thatt he respective orders of the Appellate Tribunal were not vitiated by any excess of jurisdiction or manifest error of law inasmuch that the Appellate Tribunal was entitled to refuse the grant of a permit to an applicant on the ground that such a grant would give him a monopoly of transport facilities on a particular route and in the interests of the public it was desirable to grant the new permit applied for to a different operator to encourage healthy competition. The two writ appeals before us are from the judgments of the two learned Judges. We have had the benefit of the very able arguments of several learned counsel who appeared before us for the several parties.

Section 47 (1) of the Motor Vehicles Act says that the Regional Transport Authority in deciding whether to grant or refuse a stage carriage permit shall have regard to the following matters :

(A) the interest of the public generally ;

(B) the advantage to the public of the service to be provided including the saving of time likely to be effected thereby and any convenience arising from journeys not being broken ;

(C) the adequacy of existing road passenger transport service between the places to be served, the fares charged by those services and the effect from those services of the service proposed ;

(D) the benefit to any particular locality or localities likely to be afforded by the service;

(E) the operation by the applicant of other transport services and in particular of unremunerative services in conjunction with remunerative services ; and

(F) the condition of the roads included in the proposed route or routes.

Section 43-A confers power on the State Government to issue orders and directions of a general character in respect of any matter relating to road transport to the subordinate transport authorities, which the said authorities are bound to give effect to. In exercise of these powers the Government have been issuing general directions to the transport authorities to be observed in considering applications for stage carriage permits. The first of such orders material for the purpose of these appeals is G. O. Ms. No. 432, Home, dated 6th February, 1953. It runs as follows :

" It has been brought to the notice of Government that permits for stage carriages are granted by Regional Transport Authorities sometimes to operators who though claiming to be new to the business or to be carrying on business independently are really benami operators working under the control and management or influence of big operators, who already hold a large number of bus permits. The grant of permits to such persons is not conducive to the efficient and sound working and administration of the Transport System as it would result in the concentration of passenger transport in the hands of a few big operators which is not in the public interests.

2. The Governor of Madras therefore in exercise of the powers conferred by section 43-A of the Motor Vehicles Act, 1939, hereby directs all Transport Authorities to ensure when considering applications for stage carrige permits that no permits are granted to applicants who though purporting to be new entrants in the business of road transport or to be independent operators who already hold a large number of bus permits or hold substantial interest in existing passenger transport concern."

In G. O. Ms. No. 1037, Home, dated 28th March, 1953, the Government directed that additional buses should not be permitted to ply on existing routes unless there was clear need for increase in the number of buses plying on the particular route, and laid down as a general policy that "wasteful competition should be discouraged but healthy competition where there is room should be encouraged". Then we come to G.O. Ms. No. 1298, Home, dated 28th April, 1956, which has been the subject-matter of consideration in several decisions of this Court as well as of the Supreme Court. In and by that G. O., Government laid down the principles that should be observed by all the transport authorities in the matter of granting of stage carriage permits, variations or extensions of routes, etc. It is not necessary to quote this G.O. in full. It is sufficient to refer to the general scheme of the G.O. and briefly indicate the directions given. At the outset the Government make it clear that the transport authorities should have regard to the matters metnioned in the G.O. in addition to those mentioned in section 47 (1) of the Motor Vehicles Act. First certain principles for screening and disqualifying applicants are set out. They are (1) financial instability, (2) adverse record in respect of efficiency and integrity, (3) trafficking in permits and (4) benami applications. The G. O. then proceeds to formulate a system of marking but with the proviso :

"In case where this system works unfairly the Regional Transport Authority may ignore the marks obtained for reasons to be stated."

Marks are to be given on the following grounds :

(1) to build up the strength of the fleet to viable units,

(2) possession of repair and maintenance facilities,

(3) location of residence or place of business of the applicant on the route or at the terminal,

(4) technical or business experience of transport and

(5) special circumstances like being a co-operative enterprise, etc.

There is a further G.O. Ms. No. 2265, Home, dated 9th August, 1958, but this is subsequent to the proceedings which formed the subject-matter of the writ petitions.

In the orders of the State Transport Appellate Tribunal as well as during the arguments before us there was constant mention of the term "monopoly". To avoid any confusion and to clear the ground of any possible misconception, it is better to explain the sense in which that terms has been used. A literal meaning of the word "monopoly" is "exclusive possession of a trade in some commodity" and this is generally conferred as a privilege by the State. In Vol. 36, American Jurisprudence, the restricted and extended senses in which the word 'monopoly' is used are clearly brought out in the following passage :

"In its broadest meaning 'monopoly' signifies the sole power of dealing in an article or doing a specified thing either generally or in a particular place. A legally authorised monopoly is an exclusive right or privilege. In its original and strict sense "the word meant an allowance by the King to a particular person or persons of the sole buying, selling, making, working, or using of anything whereby the subject in general, was restrained from the freedom of manufacturing or trading which he had before. However, the idea of monopoly is not now confined to a grant of privileges ; it is understood to include a condition produced by the acts of mere individuals, and its dominant thought is the suppression of competition by the unification of interest or management or through agreement and concert of action. It is considered that a monopoly exists whenever all or so nearly all of an article of trade or commerce within a community or district is brought within the hands of one man or set of men as practically to bring the handling or production of the commodity or thing within such single control, to the exclusion of competition or free traffic therein. Strictly speaking anything less than this is not a monopoly. It has been said that a monopoly of trade embraces the essential elements : (1) the acquisition of an exclusive right to, or the exclusive control of, that trade ; (2) the exclusion of all others from that right and control......"

It is obvious that in one sense the scheme of grant of permits under the Motor Vehicles Act involves a monopoly to a certain extent. On a particular route only the person who has obtained a permit from the transport authorities can ply a stage carriage. Others cannot. But at the same time, it cannot be denied that it is open to the transport authorities to grant another permit to another person to ply on the same route. The person who had been enjoying so to say a monopoly on that

route cannot complain of any legal injury to his right. In that sense there is no question of monopoly, *C. S. S. Motor Service* v. *State of Madras*[1]. It appears to us that when the word "monopoly' is used in the orders of the State Transport Appellate Tribunal and the arguments before us, what is meant is that factually a particular operator is the sole operator running several buses on a particular route without there being any competitor. The operator enjoys this favourable position not because he has an indefeasible right to such enjoyment but because it happens that he holds all the permits on that particular route, for a particular period. It may be that at the end of the period when he applies for renewal of the permit he may not be able to secure a renewal because there are other applicants more qualified who may be granted the permit. We need not embark on a discussion of the merits and defects of monopoly from the point of view of economic development. In certain circumstances monopoly in a particular kind of trade or business may be in the interest of the public but in other circumstances it may have a contrary effect and may be destructive of individual enterprise, and free competition is the life of business. Having regard to the present system in vogue relating to the grant of stage carriage permits, if monopoly in the strict sense should be avoided, then there should not be grant of a single permit to one operator on any particular route for that would mean that the State has conferred on such operator a monopoly in the carrying on of the business on that route. Monopoly, therefore, should be understood as undue concentration of a number of permits in the hands of a single operator on any route, excluding competition from other operators. We are therefore of opinion there is no scope for the argument of Mr. M. K. Nambiar that monopoly is a vice only when there is monopoly in law, that is, in the strict sense when the person enjoying the monopoly is entitled to exclude all possible competition, in which case only it may be injurious to the public interests.

It was contended on behalf of the appellants that G. O. No. 1298, dated 28th April, 1956, together with section 47 (1) of the Motor Vehicles Act forms a complete code as it were in the sense that the factors mentioned therein are exhaustive in a consideration of the comparative merits of applicants for the grant of stage carriage permits. Neither in the G. O. nor in the section is there any specific mention of monopoly as a ground of disqualification. The Tribunal, therefore, manifestly erred in disqualifying the appellants on that ground. But it has been held by this Court that neither section 47 (1) nor the aforesaid G. O. excludes from consideration other matters which are germane to the question to be decided, namely, who among the applicants is best fitted to be granted a permit. As observed by Rajagoplan, J., in Writ Petition No. 223 of 1958 :

> " It has been repeatedly laid down by this Court that the factors listed in section 47 (1) of the Act as those to be taken into account in deciding whether a permit should be granted or not to an applicant are not exhaustive. . . . Neither in express terms nor by necessary implication does G.O. No. 1298 make the factors enumerated therein as exhaustive."

But, in our opinion, there is another short way of meeting this contention of the appellants. That is by referring to section 47 (1) (*a*) of the Act, namely, "the interest of the public generally". That heading will cover any ground which might not have been expressly mentioned in section 47 or G. O. No. 1298. It is neither possible, nor is it desirable to restrict the discretion of the Regional Transport Authority to grant or refuse a stage carriage permit on considerations of public interests. Which applicant is likely to serve the interest of the public best is ultimately for the transport authorities to decide. G.O. No. 1298 refers to certain factors which were considered to be in the interests of the public. For instance, it would be obviously undesirable in the interests of the public to grant a permit to an applicant with an adverse record or who is a trafficker in permits. Likewise it would be desirable to grant a permit to an applicant who can command repair and maintenance facilities and has technical and business experience of transport. But there may be other factors operating in a positive or negative way in a consideration of the relative claims of applicants. G.O. No. 1298 itself recognises

1. (1952) 2 M.L.J. 894 at 910.

this fact when it provides for the award of 2 marks for special circumstances all of which cannot be expressly mentioned. The G.O. uses the significant phrase "imponderable factors" in this connection. The Tribunal would be strictly acting within the scope of section 47 (1) (*a*) if it holds that an applicant is not entitled to the grant of a stage carriage permit on a particular route if it considers that as the applicant has already the monopoly on the route, in the sense that he already holds all the permits on that route or a major part of that route, it would be in the interests of the public to grant the permit to another applicant on the ground that there was likelihood of abuse of the monopoly. It is not only only when there is actual proof of abuse that monopoly would be a relevant ground. Likelihood of abuse would be equally relevant. We realise that a hard and fast rule cannot be laid down as to when an applicant can be said to enjoy monopoly on a particular route. If there are ten buses plying a route and the permits for all the buses are held by one operator, the Tribunal would not have much difficulty in holding that he has a monopoly. At the other end, if an operator has got only one permit on the route, the Tribunal would be justified in holding that there is no question of monopoly. In the very nature of the matter, it must be left entirely to the transport authorities to decide on the facts and circumstances of each particular case, whether an applicant can be refused a stage carriage permit on the ground that he enjoys a monopoly on that route. This Court cannot substitute its own discretion in such a matter, though this Court would be ready to interfere with an obviously perverse exercise of such discretion. As observed by Lord Porter in *Commonwealth of Australia* v. *Bank of New South Wales*[1] dealing with a case of monopoly,

"Every case must be judged on its own facts and in its own setting of time and circumstances."

The appellant in Writ Appeal No. 101 of 1958 was the only operator plying three buses on a section of twelve miles on the route of sixteen miles. The appellant in Writ Appeal No. 55 of 1953 had already permits for four buses on the route and on a part of the route four buses plying. We are unable to say that the Appellate Tribunal made a manifest error of law in holding that it is not desirable to grant further permits to the two appellants on the two routes in question respectively, on the ground that monopoly should be avoided in public interest.

Before leaving this point we may also advert to two of the G.Os. earlier to G.O. No. 1298 in which the Government indicate that it is desirable in the public interests to prevent monopoly and to encourage healthy competition. In G. O. No. 432, dated 6th February, 1953, the Government declared that the concentration of passenger transport in the hands of a few big operators is not in the public interest. In G. O. No. 1037, dated 28th March, 1953, the Government says that

"wasteful competition should be discouraged but healthy competition where there is room should be encouraged."

We are unable to accept the rather ingenious argument of Mr. M. K. Nambiar that there is no scope for healthy competition under the system of regulation of motor transport under the Motor Vehicles Act. In support of his argument he relied on the fixing of different timings for different buses and other similar rules relating to the scale of fees chargeable, etc. In spite of all these restrictive regulations there is certainly room for healthy competition in the manner of serving the travelling public by provision for better amenities, comfort and attention. This, however, is only one aspect of the matter. There is the other important aspect, that if all the buses running on a particular route belong to only one operator, then the travelling public will be practically at the mercy of that operator.

It was said that any consideration of monopoly and likelihood of its abuse is in conflict with section 47 (1) (*e*) which is in the following terms :

"The operation by the applicant of other transport services and in particular of unremunerative services in conjunction with remunerative services."

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1. L.R. (1950) A.C. 235.

In the first place this Court has held that section 47 (1) (*e*) is wholly void: *C. S. S. Motor Service* v. *State of Madras*[1]. Even if it is not, the subject-matter of that clause has nothing to do with monopoly. It really relates to the economic aspect from the point of view of the individual applicant.

There only remains the contentions raised by learned counsel for the appellants based on the provisions of the Constitution. First Article 19 (1) (*g*) read with Article 19 (6). It is contended that elimination of the appellants on the ground of alleged monopoly would not be a reasonable restriction in the interests of the public within the meaning of Article 19 (6) of the Constitution. Reference was made to passages in the judgment of the Supreme Court in *Cooverjee B. Bharucha* v. *The Excise Commissioner and the Chief Commisssioner, Ajmer and others*[2], *C. S. S. Motor Service* v. *State of Madras*[1] and Rottschaefer on "Constitutional Law." In our opinion they do not materially assist the appellants. In *Cooverjee B. Bharucha* v. *The Excise Commissioner and the Chief Commissioner, Ajmer and others*[2], Mahajan, C.J., in repelling the contention that some of the provisions of the Excise Regulation I of 1915 of Bihar enabled the Government to confer monopoly rights on one or more persons to the exclusion of others and that a creation of such monopoly rights would not be sustained under Article 19 (6) observed :

"Elimination and exclusion from business is inherent in the nature of liquor business and it will hardly be proper to apply to such a business principles applicable to trades which all could carry. The provisions of the regulation cannot be attacked merely on the grounds that they create a monopoly. Properly speaking, there can be a monopoly only when a trade which could be carried on by all persons is entrusted by law to one or more persons to the exclusion of the general public. Such, however, is not the case with the business of liquor."

The same considerations apply to the business of public transport. In *C. S. S. Motor Service* v. *State of Madras*[1], to which one of us was a party, similar observations occur. Venkatarama Aiyar, J., said :

"The nature of the business is, therefore, an important element in deciding on the reasonableness of the restrictions. It has been already mentioned that while a citizen has a right to carry on the business of motor transport on public pathways, the latter, however, are owned and held by the State as trustees on behalf of the public; that the rights of a citizen to use the streets are limited by similar rights possessed by the other citizens and that it would be within the power of the State as such trustees to limit the number of transports that could run on the road and to even totally prohibit its running. Elimination and exclusion are inherent in the nature of this business and it would hardly be proper to apply to such a business principles applicable to trades which all could carry. Nor can the provisions of the Act be attacked on the ground that they create a monopoly. Properly speaking there can be a monopoly only when a trade which could be carried on by all persons is entrusted by law to one or more persons to the exclusion of the general public. Such, however, is not the case with the business of motor transport."

The statement in Rottschaefer's book only goes to show that in certain circumstances the grant of a monopoly of a class of business to a private corporation would not violate any rights guaranteed to those excluded from such business by the due process clause of the 14th Amendment. In the present case the question is not whether the grant of a monopoly is valid but whether excluding an applicant on the ground that the grant of another permit to him has the effect of giving him a monopoly would be an unreasonable restriction. We have already held that such exclusion would he in the interests of the public. The restriction is certainly not unreasonable because appellants have not been completely precluded from carrying on the business of motor transport. The Constitution does not guarantee to any person the exclusive right to operate all the buses that are allowed to ply on any particular route.

It was next contended that the principle of Article 14 had been violated because the Tribunal had not been consistent in the application of the principle that monopoly would be a ground for excluding an applicant. Our attention was drawn to certain prior orders of the transport authorities in which it was alleged that this principle was not applied. In the first place we are not convinced that there has been such in-

1. (1952) 2 M.L.J. 894.
2. (1954) S.C.J. 246 : (1954) S.C.R. 873 at 881.

consistency between different orders in fact. In one case the State Transport Appellate Tribunal refused to exclude an applicant on the ground of monopoly; but in that case the applicant had only one permit at the time of the application for the second permit. In another case the Appellate Tribunal similarly refused to exclude an applicant on the ground that he already had one permit. This is what he said :

"It is no doubt an accepted policy of the Government that monopoly should not be granted and that healthy competition should be encouraged. But the question is can the grant of two permits on the same route to one operator be said to amount to grant of a monopoly. In Writ Appeal No. 65 of 1955 their Lordships have observed that they cannot say that the grant of two permits to one party amounts to grant of a monopoly."

In another case cited to us the Appellate Tribunal held that there was no monopoly, in fact, as other buses belonging to other operators were also running on the route. Even assuming that there are such inconsistent orders of the Appellate Tribunal, we are of opinion that Article 14 will have no application. We reiterate what was said in the decision of a Bench of this Court to which one of us was party, in Writ Appeals No. 31 and 32 of 1954, namely :

"The fact that there are several inconsistent orders of a Tribunal does not mean that all the orders are wrong, as contravening Article 14 of the Constitution. One order cannot be attacked as invalid solely on the ground that it is inconsistent on principle with an earlier or later order. It may be that the order impugned may be the right order and the other inconsistent order may be wrong. Each order, when it comes up before this Court, has to be examined on the merits, having regard to the facts and circumstances of that particular case."

There is no substance in any of the contentions based on the Constitution.

Mr. M. K. Nambiyar and Mr. Jagadisa Ayyar cited authorities for the position that if irrelevant considerations are taken into account by an inferior tribunal in disposing of the question before it, this Court would have jurisdiction to interfere under Article 226. We have no quarrel with the proposition; but in the cases before us no irrelevant consideration has been taken into account.

In the result the appeals fail and are dismissed with costs of the contesting respondents. Advocate's fee Rs. 200.

R.M. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

The Public Prosecutor .. *Appellant**

v.

T. M. Natarajan .. *Respondent.*

Madras Village Panchayats Act (X of 1950), section 106—Sanction under for prosecution—Whether necessary in cases where the accused is an ex-president or executive authority of a panchayat.

In order to attract the operation of section 106 of the Madras Village Panchayats Act two conditions must be satisfied, *viz.*, that the accused is a president, executive authority, etc., of a panchayat and the offence is alleged to have been committed by him while acting or purporting to act in the exercise of his duty as such president, executive authority, etc. The point of time when both these conditions should be satisfied before sanction can be said to be necessary under section 106 of the Act is the time when the complaint or police report or information is received by the Magistrate. The mere fact that the accused was the president or executive authority of a panchayat at the time he committed an offence does not mean that sanction is required under section 106 of the Act if he is not holding such position at the time the prosecution is launched.

Muniswami Chetti, In re, (1958) M.L.J. (Crl.) 80 : (1958) 1 An. W.R. 79, followed.

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid Respondent (Accused) by the Additional First Class Magistrate of Tiruvellore in C.C. No. 20 of 1958 on his file.

The Public Prosecutor (*P. S. Kailasam*), for Appellant.

T. A. Raghunathachari, for Respondent.

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* Crl. Appeal No. 320 of 1958.

2nd April, 1959.
(12th Chaitra, 1880—Saka).

The Court delivered the following

JUDGMENT.—This is an appeal by the State against the acquittal of the respondent by the Additional First Class Magistrate, Tiruvellore, in C.C. No. 20 of 1958, on his file.

The respondent was the President of the Panchayat Board of Tirumullaivayal. He auctioned the right to collect the fees from the stalls to be put up in Avadi during Congress Session in 1955. P.W. 1 took it for Rs. 4,090. But the auction in favour of P.W. 1 was set aside and the accused was therefore under an obligation to return the amount. The collection of the amount is not disputed by the accused. He had deposited some amount in the Sub-Treasury and some amount in the Post Office Savings Bank. The amount that he had deposited in the Treasury was withdrawn on 29th December, 1954 and that was about Rs. 2,145 and Rs. 1,000 was withdrawn from the Post Office Savings Bank on 28th December, 1954. This fact is also not disputed. The balance of Rs. 945 was withdrawn later. The withdrawal of these sums, therefore, from the Sub-Treasury and the Post Office Savings Bank is admitted by the accused.

The case for the prosecution is that the accused did not pay a single pie to P.W.1. The case of the accused is that on 28th December, 1954, he paid Rs. 3,145 to P.W. 1 and reserved Rs. 945 towards the loan which P.W. 1 is said to have promised to advance to the accused on a mortgage. The loan that was promised was to the tune of Rs. 3,000. Towards this loan according to the accused he reserved Rs. 945. He, therefore, pleads payment of Rs. 3,145 and admits retention of Rs. 945 for the reasons mentioned by him.

If these two circumstances are established certainly it cannot be said that the guilt of the accused has been established beyond all reasonable doubt. But the difficulty arises with regard to the payment of Rs. 3,145 to P.W. 1. Admittedly no receipt was obtained by the accused from P.W.1. According to the accused he asked P. W. 1 to pass a receipt but P.W. 1 is said to have told him whether he cannot be trusted for this sum and P.W. 1 is further said to have told that on payment of the balance he will pass a final receipt. This payment of Rs. 3,145 is said to have been made in the presence of D.Ws. 1 and 2. It was suggested to P.W. 1 in the course of cross-examination that this sum was paid in the presence of D.W. 1 and one Kadirvelu Mudaliar. Kadirvelu Mudaliar has not been examined but instead one Krishnaswami Naidu has been examined. It was not suggested to P.W. 1 that Krishnaswami Naidu was present at the time when the accused paid the money. According to the suggestion made to P.W. 1 there were only two persons present at the time of the payment, Ponnambala Mudaliar, D.W. 1 and Kadirvelu Mudaliar who is not examined, there was no suggestion that another person was present. Nevertheless D.W. 2 has been called as a witness said to have been present at the time of payment of Rs. 3,145. This by itself is sufficient to reject the evidence of D.W. 2.

So far as D. W. 1 is concerned, he is a distant relative of the accused and the learned Additional First Class Magistrate very rightly rejected the evidence of these two witnesses. When the evidence of the two witnesses has been rejected, then there is no proof that the accused paid a sum of Rs. 3,145 on 28th December, 1954. One circumstance which improbabilises the statement, and which confirms the finding of the lower Court that the evidence of the defence witnesses cannot be accepted is this. On 24th February, 1955, P. W. 1 issues notice to the accused calling upon him to pay the amount due to him. He has no doubt mentioned that in addition to the sum paid he has also paid another Rs. 100. To this notice the accused did not send reply at all till about July, 1955. The reply notice is dated 4th July, 1955. For about five months the accused has not sent a reply notice. Instead he has caused Exhibits D-2 and D-3, Encumbrance Certificate to be sent on 7th and 12th March, 1955, to P.W. 1. There can be no doubt that Exhibits D-2 and D-3 were received by P. W. 1 on the respective dates. But on the averments in Exhibit P-4 that the sum of Rs. 4,025 is due to him and that he has not paid inspite of repeated demands, if really the accused has paid Rs. 3,145 on 28th December, 1954, then certainly the

accused would not have kept quiet. He would have immediately rushed to him in person or through a lawyer who would have given immediate reply to the notice, asserting that he has paid on such and such a date the sum and in the presence of two persons. He did nothing of the kind. After arranging to send the two Encumbrance Certificates, he keeps quiet for about four or five months and leisurely sends his reply notice in July, 1955, mentioning therein that the sum was paid. The lower Court very rightly disbelieved the accused and from his conduct he found that this sum of Rs. 3,145 could not have been paid to P.W. 1.

Mr. Raghunathachari, appearing for the respondent, points out that P.W. 1 admits that he returned the amount which he borrowed from Multani. That shows that he must have paid only from the money paid by the accused. No question is suggested as to how he returned the amount to Multani. According to his evidence he is earning about Rs. 2,000 a month. He is worth about a lakh of rupees. These answers have been elicited in the course of cross-examination. There is nothing improbable, therefore in P.W. 1 returning this Rs.3,145 from his own moneys. In the absence of a suggestion put to him or ascertainment from him as to how he paid the amount to the Multani, this argument that he must have paid from the amount paid is not of much force.

It is true that in the enquiry which was started by the District Panchayat Officer sometime in December, 1955, the accused set up the theory of payment of Rs. 3,145 to P. W. 1 and he produced witnesses before the District Panchayat Officer. But it must be remembered that this is about 10 months after the notice was received. There is nothing improbable that by this time he was procuring witnesses to support his case, as undoubtedly he will have to face a criminal prosecution. The fact that these witnesses have made statement before the District Panchayat Officer does not in my opinion carry the case much further. The evidence has been rejected by the lower Court and I agree entirely with the lower Court in regard to the appreciation of the evidence of D. Ws. 1 and 2.

On the evidence, therefore, it is clearly established that the accused did not pay the amount to P. W. 1 though he withdrew it from the Treasury and from the Savings Bank. He is, therefore clearly guilty of the offence with which he has been charged.

The lower Court found that the accused had not paid the amount, but acquitted him on the ground that no sanction had been obtained to prosecute the respondent. Under section 106 of the Village Panchayats Act when the President, Executive Authority or any member is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognisance of such offence except with the previous sanction of the Government. Since sanction was not obtained and the lower Court acquitted the accused. The question is whether it is necessary to obtain sanction to prosecute the accused.

At the time when the prosecution was launched the respondent was not President or Executive Authority of the Panchayat. For a person who was a President, and in that capacity he withdrew the money and misappropriated the same and when he subsequently ceased to be the President when prosecution is launched against the President after he ceased to be the President, the question is whether section 106 applies to him.

In *Muniswami Chetti, In re*[1], Krishna Rao, J., of the Andhra Pradesh High Court has pointed out referring to this section 106 itself that there are two conditions precedent to the prohibition thereunder, namely, that the accused is a President, Executive Authority, etc., of a panchayat; (ii) the offence is alleged to have been committed by him while acting or purporting to act in the exercise of his duty. It takes cognisance of offences where these conditions exist. Therefore both these

1. (1958) M.L.J. (Crl.) 80 : (1958) 1 An. W.R. 79.

conditions must be satisfied at the time when a criminal Court takes cognisance of the offence in the exercise of its original jurisdiction under section 190, Criminal Procedure Code. The point of time is when the complaint, or police report or information is received by the Magistrate. It must be at that time that the accused has to hold the status of a President, etc., of a panchayat in order to satisfy the first condition. The language of the section does not support the view that the prohibition relates only to the character of the offences complained of which would require an official status for the accused only at the time of the commission of the offence. He, therefore, held in that case that at the time when the prosecution was launched he did not possess the status. Undoubtedly when he committed the offence he held the status. Therefore Krishna Rao, J., held that no sanction was necessary. In one of the cases which came up before him along with these cases which he decided one was a member at the time when prosecution was launched and therefore he upheld that sanction was necessary.

The Supreme Court in *S. A. Venkataraman* v. *The State*[1], considered the question under Act II of 1947. They have also held to the same effect. But it is contended that section 6 of Act II of 1947 is different in its wording from section 106 of the Village Panchayats Act or section 197, Criminal Procedure Code. In my opinion though there is a slight difference in the wording that difference does not affect the construction to be placed upon this section. Their Lordships of the Supreme Court have pointed out in considering the words of section 6 of Act II of 1947 that at the time a Court is asked to take cognisance not only the offence must have been committed by a public servant but the person accused *is still* a public servant (the italics mine) removable from his office by a competent authority.

Applying the principles laid down by their Lordships of the Supreme Court in the above decision and following the decision of Krishna Rao, J., in *Muniswami Chetti*, In re[2], I hold that no sanction is necessary in this case. The acquittal is, therefore, not justified on this ground, and it is set aside.

The only question next to be considered is the sentence to be awarded. As the amount paid by P.W. 1 was not repaid, I gave an opportunity to the respondent herein to pay the amount, so that I can deal with him leniently. But in spite of opportunity being given for a sufficiently long time he has not availed himself of it and he has not paid a single pie. In the circumstances I have no other alternative but to award a fairly severe sentence. I find the accused guilty of the offence with which he has been charged and sentenced him to two years' rigorous imprisonment and a fine of Rs. 2,000 in default six months' rigorous imprisonment. Out of the fine collected a sum of Rs. 1,000 will be paid to P.W. 1 as compensation to the losses. This amount of Rs. 1,000 when paid will be given due credit when the decree is sought to be executed. This appeal is therefore allowed.

R.M. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Thirunavukkarasu and others .. *Petitioners**.

Criminal Procedure Code (V of 1898), *as amended by Act (XXVI of* 1955), *sections* 107, 112 *and* 117 (3)—*Scope and nature of proceedings under—Interim order under section* 117 (3)—*Grounds for—Essentials of legality—Interference by High Court—Grounds—Sections* 435 *and* 439.

Chapter VIII of the Code of Criminal Procedure is preventive and not punitive. Section 107 is not intended for the punishment of past offences but for the prevention of acts that may amount to or may lead to a breach of the peace hereafter.

1. (1958) 2 M.L.J. (S.C.) 45 : (1958) M.L.J. (Crl.) 473 : (1958) 2 An. W.R. (S.C.) 45: (1958) S.C.J. 594 : A.I.R. 1958 S.C. 107 (S.C.).

2. (1958) M.L.J. (Crl.) 80 : (1958) 1 An. W.R. 79.

* Cr.R.C. No. 944 of 1958. (Cr.R.P. No. 904 of 1958.) 12th November, 1958. (21st Kartika, 1889—Saka.)

Sukhlal Karnani v. *Emperor*, A.I.R. 1938 Cal. 583 ; *Shadilal* v. *Emperor*, A.I.R. 1931 Lah. 191 ; *Maruthapali Goundar*, In re, A.I.R. 1937 Mad. 356 ; *Rangaswami Nayudu*, In re, (1943) 1 M.L.J. 246: A.I.R. 1943 Mad. 394 ; *Mahabir Gope* v. *Samrathi Singh*, A.I.R. 1940 Pat. 228 ; *Deoballam Singh* v. *Gorakhnath Singh*, A.I.R. 1947 Pat. 235 ; *Inder Singh* v. *Harbans Singh*, A.I.R. 1955 Punj. 139 ; *Shivram Parashram*, In re, (1904) 1 Crl. L.J. 755 and *Banarsi Raut* v. *Emperor*, (1937) 39 Crl. L.J. 952, relied on.

The institution of proceedings under section 107 is not an accusation of an offence ; the itemised particulars given in section 112 notice are not a catalogue of charges, but information which according to the prosecution leads to the inference that the counter-petitioner is a person likely to commit a breach of the peace or disturb public tranquillity or do a wrongful act, etc., and against which the counter-petitioner is asked to show cause. The order binding over the person under the security proceedings is not a conviction.

Section 107 would apply notwithstanding that the acts alleged as giving rise to an apprehension of a breach of the peace on the part of a person constitute themselves specific offences for which he may be punished. Any evidence which would be relevant to the information under inquiry would be admissible. The existence of a number of previous convictions or acquittals in a number of previous cases will not be substantive evidence in proceedings under section 107 as in the case of proceedings under section 110.

An order under section 117 (3), being in the nature of an interim order must be of a kind which could be made in a permanent order in the proceedings and is not a mere routine order nor meant merely to anticipate the final order that may be made under section 118. It is designed to meet an emergency. The Magistrate must direct his attention particularly to the question of emergency and the necessity of immediate measures as a separate case. An order under section 117 (3) passed after considering the question of emergency as a separate question is not bad merely because the Magistrate has based it on the same information which was the basis of his order under section 112.

An order under Chapter VIII is no doubt revisable by the Court under sections 435 and 439 of the Code, but the High Court is not a Court of appeal and will not ordinarily interfere on the merits provided the lower Court shows in its judgment that it has really and not nominally considered the evidence on record and has approached the case in a fair way having regard to the interests of the prosecution as well as the defence.

Case-law referred to in detail.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Court of the Executive *ex officio* First Class Magistrate, Chidambaram, dated 27th July, 1958 and made in M.C. No. 2 of 1958.

K. Narayanaswamy Mudaliar, for Petitioners.

V. V. Radhakrishnan, for the Public Prosecutor (*P. S. Kailasam*), on behalf of the State.

The Court made the following

ORDER.—This revision is sought to be filed against the order made by the *ex officio* First Class Magistrate, Chidambaram, in M.C. No. 2 of 1958, under section 117 (3) of the Code of Criminal Procedure.

In this case security proceedings under section 109 of the Code of Criminal Procedure have been taken against 22 persons on a report of the Criminal Inspector of Police, Kurinjipadi. The order in writing made under section 112 sets out the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force and the sureties required. The learned Magistrate has then proceeded under section 117(3) and has taken interim bonds. The present revision is preferred against that order directing the execution of interim bonds. The grounds on which this revision is preferred are twofold *viz.*, that there was no necessity to take interim bonds ; and secondly, part of the information itemised against the counter-petitioners as constituting the basis for asking them to show cause consists of criminal cases in which they were acquitted.

Chapter VIII of the Code of Criminal Procedure dealing with prevention of offences and of security for keeping the peace and for good behaviour, is not intended to punish persons for every repetition but to guard society from them by placing them under such substantial but not excessive security as to prevent them rom resorting to evil course. This Chapter is *preventive* and not *punitive*. *Mahabir*

Gope v. *Samrathi Singh*[1], *Sukhlal Karnani* v. *Emperor*[2], *Baburam* v. *Emperor*[3], *Shadilal* v. *Emperor*[4], *Maruthapali Goundar*, In re[5], *Deo Ballam Singh* v. *Goraknath Singh*[6], *Inder Singh* v. *Harbans Singh*[7].

In other words, section 107 is not intended for the punishment of past offences but for the prevention of acts that may amount or may lead to a breach of the peace hereafter. *Rangaswami Nayudu*, In re[8], *Shivaram Parashram*, In re[9], *Banarsi Raut* v. *Emperor*[10].

The institution of proceedings under section 107 is not an accusation of an offence the itemised particulars given in section 112 notice is not a catalogue of charges but information which according to the prosecution leads to the inference that the counter-petitioner is a person likely to commit a breach of the peace or disturb public tranquillity or do a wrongful act, etc., and against which the counter-petitioner is asked to show cause and therefore if for instance the information proves to be false, the Court has no power to act under section 250, Criminal Procedure Code. Nor does the principle of *autre fois acquit* or *autre fois convict* (section 403, Criminal Procedure Code) apply to such proceedings. Hence, where the person proceeded against is imprisoned for failure to give security, his subsequent trial for the acts on which the security proceedings were based is not barred under section 403 of the Code or Article 20 of the Constitution of India. *Mathai Manjuram* v. *The State*[11]. The person proceeded against is the person and not an accused and even before the amendment under section 342, Criminal Procedure Code, was competent to give evidence on his behalf; information under the section is not a complaint. The order binding over the person under the security proceedings is not a conviction. Several provisions of the Criminal Procedure Code are inapplicable to a person proceeded against under section 107 as distinct from an accused under the Criminal Procedure Code, *Kartik Chandra* v. *Panna Lal*[12].

Section 107 is applicable notwithstanding that the acts alleged as giving rise to an apprehension of breach of the peace on the part of a person, constitute themselves specific offences for which he may be punished. It is also not illegal for a Magistrate in a proceeding under section 107 to admit evidence on a specific charge or offence which is the subject of a separate current trial, as the scope of the proceedings is entirely different, one being concerned with offences committed in the past and the other being concerned with the likelihood of the breach of the peace in the future : *Khetrabasi Sahu* v. *Emperor*[13]; *Rangaswami Nayudu*, In re[8].

Any evidence which would be relevant to the information under enquiry would be admissible. The existence of a number of previous convictions or acquittals in a number of previous cases will not be substantive evidence in proceedings under section 107 as in the case of proceedings under section 110. The existence of previous convictions for offences such as theft is a matter which may and should be taken into consideration as indicating the character and disposition of the counter-petitioner in proceedings under section 110(section 54, *Explanation* 2, of the Evidence Act), though the existence of such a conviction is not by itself sufficient for an order for security. Weight and due regard must be given to the period that has elapsed subsequent to the last conviction in order to see whether during that period he has shown a disposition to conduct himself properly or whether there are indications that he has continued the previous course though he may not have actually brought himself within the clutches of law. Similarly cases of acquittal may be taken into consideration under section 110 because where evidence is taken as to reputation, the Court cannot and should not exclude the reasons which induced the members of the community to form a bad opinion of the accused and if their opinion is based wholly or partly on the belief that he had committed a crime which has not been brought home to him, the Court cannot rule out as inadmissible all evidence on

1. A.I.R. 1940 Pat. 252.
2. A.I.R. 1938 Cal. 583.
3. A.I.R. 1932 Lah. 101.
4. A.I.R. 1931 Lah. 191.
5. A.I.R. 1937 Mad. 356.
6. A.I.R. 1947 Pat. 235.
7. A.I.R. 1955 Punj. 139.
8. (1943) 1 M.L.J. 246 : A.I.R. 1943 Mad. 394 : 44 Crl. L.J. 756.
9. (1904) 1 Cr. L.J. 755.
10. (1937) 39 Cr. L.J. 952.
11. A.I R. 1952 T.C. 556.
12. A.I.R. 1958 Cal. 140.
13. A.I.R. 1918 Pat. 183: 19 Cr. L.J. 246.

which the belief of the witness is based. Hence instances of specific crimes are admissible evidence although they are not supported by evidence of such amount and value as would secure a conviction for a substantive offence. It has been held that evidence relating to the incident which formed the subject-matter of the previous trial cannot be excluded ; the fact of acquittal although it may diminish and destroy value of the evidence, has not the effect of rendering such evidence inadmissible. Evidence of repute no doubt cannot be let in proceedings under section 107 as in the case of proceedings under section 110. But even in the case of proceedings under section 107 reports or complaints by the several prosecution witnesses on various dates regarding the past conduct of the accused and his disposition to use violence, though not substantive evidence of the matters mentioned in them, are admissible under section 157 of the Evidence Act to corroborate what the witnesses testify in Court that the person sought to be bound over is likely to commit a breach of the peace or disturb the public tranquillity or do a harmful act that may probably occasion a breach of the peace or disturb the public tranquillity. *Khetrabasi Sahu* v. *Emperor*[1], *Rangaswami Nayudu*, In re[2].

In taking interim bond under section 117 (3) the Magistrate who is the head of the Taluk, Division or District and is responsible for the maintenance of law and order there, is vested with a wide discretion. An order under section 117(3) being in the nature of an interim order must be of a kind which could be made in a permanent order in the proceedings. It is not a mere routine order to be appended to an order under section 112 and is not meant merely to anticipate the final order that may be made under section 118. It is designed to meet an emergency. The Magistrate must direct his consideration particularly to the question of emergency and the necessity of immediate measures as a separate case. But this does not mean that he should conduct an enquiry within an enquiry, take evidence of witness on oath and their cross-examination in the usual manner. If the Magistrate is satisfied that an emergency exists and urgent orders are necessary, he can act upon the application of the Police Officer or upon the sworn testimony of a Police Prosecutor given in the witness-box or in the form of affidavits. An order under sub-section (3) of section 117 passed after considering the question of emergency as a separate question is not bad merely because the Magistrate has based it on the same information which was the basis of his order under section 112. *Pir Shah* v. *Emperor*[3], *Bachal* v. *Emperor*[4], *Emperor* v. *Ghulan*[5], *Emperor* v. *Nabibu*[6], *Emperor* v. *Ratnam*[7], In re *Venkataswami*[8], *Jaswant Singh*, In re[9], *Surat Ishar Singh* v. *Jagat Singh Jiwan Ram*[10], *Hurmat*, In re[11], *Ratlal*, In re[12], *Jagadish Prasad Verma v. The State*[13], *Ghaffar* v. *Saratalla*[14], *Kartick Chandra* v. *Panna Lal*[15].

An order passed under Chapter VIII of the Code is no doubt revisable by the High Court. The High Court, however, is not a Court of appeal and will not ordinarily interfere on the merits provided the lower Court shows in its judgment that it has really and not nominally considered the evidence on record and has approached the case in a fair way having regard to the interests of the prosecution as well as the defence.

Bearing these principles in mind, if we examine the facts of this case, there cannot be the slightest doubt that the detailed order of the learned Magistrate based upon relevant and admissible materials and showing that he has approached the matter from the point of view of emergency is irreproachable.

This Revision is dismissed.

P.R.N. ——— *Revision dismissed.*

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1. 19 Crl. L. J. 246 : A.I.R. 1918 Pat. 183.
2. (1943) 1 M.L.J. 246 : 44 Crl. L.J. 756 : A.I.R. 1943 Mad. 394.
3. 27 Crl. L.J. 1030.
4. A.I.R. 1942 Sind 77.
5. A.I.R. 1943 Sind 122.
6. A.I.R. 1942 Sind 86.
7. A.I.R. 1943 Sind 173.
8. (1954) 2 M.L.J. (An.) 250 : A.I.R. 1955 An. 96.
9. A.I.R. 1954 Madh. Bha. 192.
10. A.I.R. 1955 N.U.C. Punj. 1614.
11. A.I.R. 1953 Pat. 132.
12. 1956 Crl. L.J. 712 : A.I.R. 1956 Bom. 385.
13. 1957 Crl. L.J. 386 : A.I.R. 1957 Pat. 106.
14. 1957 Cr. L.J. 147 (Orissa).
15. A.I.R. 1958 Cal. 140.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

Kumari C. Gabriel .. *Petitioner**

v.

The State of Madras running the National Employment Organisation represented by the Director of Industries and Commerce, Chepauk, Madras 5 and others .. *Respondents.*

Constitution of India (1950), *Article* 226—*Writ of* certiorari *to quash an order—Jurisdiction of Court—If depends on the presence of the officer before the Court—Judicial and quasi-judicial tribunals—Enquiry by—Form and procedure to be adopted.*

The true scope of the writ of *certiorari* is to merely demolish the offending order. Hence in such cases the presence of the offender before the Court, though proper, is not necessary for the exercise of the jurisdiction or to render its determination effective.

All enquiries, judicial, departmental or other, into the conduct of individuals must conform to certain standards. One is that the person proceeded against must be given a fair and reasonable opportunity to defend himself. Another is that the person charged with the duty of holding the enquiry must discharge that duty without bias and certainly without vindictiveness. He must conduct himself objectively and dispassionately not merely during the procedural stages of the enquiry, but also in dealing with the evidence and the material on record when drawing up the final order. A further requirement is that the conclusion must be rested on the evidence and not on matters outside the record. It must not be based on a misreading of the evidence. These requirements are basic and cannot be whittled down whatever be the nature of the enquiry. Where the enquiry is judicial there is yet another requirement which should be complied with, namely, that it is not sufficient that justice is done, but that justice should also manifestly appear to be done.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the order of the Regional Director of Resettlement and Employment, Nungambakkam, Madras, in No. 8/25/55, dated 29th October, 1956 and to quash the said order made therein.

Kesavlal Tarwady, for Petitioner.

The Advocate-General (*V. K. Thiruvenkatachari*) and the Government Pleader (*B. V. Viswantha Iyer*), on behalf of the Respondents.

The Court made the following

ORDER.—This is a petition for the issue of an appropriate writ to quash the order of the Regional Director of Resettlement and Employment, Madras, dated 29th October, 1956, dismissing the petitioner from the service of the Government of India.

Miss Gabriel the petitioner was first employed as a typist in the Chief Secretariat, Madras. Subsequently she worked as a clerk under the Hindu Law Reform Committee and later became a senior clerk in the office of the Dy. Controller-General of Civil Supplies. In course of time the petitioner was declared a quasi-permanent employee of the Central Government under the Central Civil Services (Temporary Service) Rules, 1949. In 1955 the petitioner was working in the Regional Employment Exchange, Madras. One Mr. Pushparaj was then the head of the office, he being at the time the Regional Director of Resettlement and Employment.

In July and August, 1955, copies of a pseudonymous communication addressed to Sri Kandhu Bhai Desai, Minister for Labour, Government of India, came by post to various employees in this office of the Director of Resettlement and Employment. It is not necessary to refer to the various allegations in this communication. It will be sufficient to say that *inter alia* it attributed various categories of infamous conduct to Mr. Abdul Khader, the previous Regional Director; to Mr. Pushparaj,

* W.P. No. 1515 of 1956. 14th November, 1958. (23rd Kartika, 1880-Saka.).

the then Director; to Mr. Nambiar, an Assistant Director; to Kumari Arundhathi, Dy. Regional Employment Officer; and to various other individuals connected with the organisation.

The earliest of these communications was received on 23rd July, 1955, by Mr. Anugraham, Assistant Director of Employment Exchanges, in the office of the Regional Director, Madras. He took it to the notice of the Regional Director who instructed him to keep an eye open for any further petitions of the kind as might arrive later. Three days later copies of the same petition were received by two clerks named Hassan and Padmanabhan who handed them over to Mr. Anugraham. On 26th July, 1955, Mr. Nambiar and Mr. Pushparaj had a discussion on this subject and the following day Mr. Nambiar sent to Mr. Pushparaj three copies of the same communication which had arrived in his office together with the envelopes in which they had arrived. Of these one was addressed to Mr. Nambiar and the remaining two to other employees in that office. On 2nd August, 1955, four more covers addressed in a handwriting similar to that which had been noticed in some of the earlier covers were received. Mr. Anugraham took them to Mr. Pushparaj. These were kept intact for further investigation. In all eleven such copies were received as set out in Annexure IX to the order of Mr. Pushparaj.

What happened thereafter is set out in paragraph 3 of his order :

"Thereafter I made preliminary investigations and examined one of the recipients of these covers Shri Chandrasekharan and some of the clerks of the R.E.E., *viz.*, Shri Jayapalan and Shrimathi Leelavathi whose statements were recorded. All these clerks solemnly affirmed that the handwriting of the addresses on the covers shown to them was that of Kumari Gabriel who was their erstwhile co-clerk. Besides the opinion of these clerks, I also had the opinion of the R.E.O., Shri Nambiar and my Assistant Director Shri Anugraham who were also definitely of the opinion that the handwriting resembled that of Kumari Gabriel. Being thus satisfied that there was a *prima facie* case against Kumari Cabriel that she had sent out these typewritten petitions over a pseudonymous name and that she has been indulging in this sort of subversive activities with intent to insult, annoy, defame and bring into disrepute some of the officers and staff of this organisation and that as the offence committed by her in circulating this highly obnoxious and defamatory petition was of a very serious and grave nature warranting drastic action, I placed Kumari C. Gabriel under suspension with effect from 17th September, 1955, pending a regular enquiry against her."

When the order of suspension was served on the petitioner she protested that it was based on unfounded suspicions, that there was no justification to punish her, and, that the order of suspension should be cancelled and an enquiry conducted. Mr. Pushparaj, however, took the view that :

" Her contention that the suspension was a punishment is incorrect. As the head of the office and appointing authority competent to take departmental action against Class III staff, I placed her under suspension as I apprehended that if she were allowed to continue in the office she might tamper with records which contained her handwriting and that her presence will not be conducive to further investigations."

Subsequently Mr. Pushparaj continued his investigation and after examining more witnesses he framed the following charge against the petitioner :

" That Kumari C. Gabriel, Junior Clerk, Office of the Assistant Director of Training, under suspension indulged in subversive activities by defaming some of the officers and staff of this Region and also bringing the Employment Organisation in Madras Region into disrepute by circulating typewritten copies of a highly defamatory petition over a pseudonymous name containing false and vexatious allegations of a most serious, obnoxious and damaging nature against some of the officers and staff of this organisation, in postal envelopes on which she has herself written most part of the addresses and has thereby committed a grave and serious offence, revealing misconduct of a most reprehensible nature warranting severe disciplinary action."

A copy of this charge was served on the petitioner on 28th September, 1955.

As soon as she was placed under suspension, on 26th September, 1955, Miss Gabriel sent a petition to the Regional Director, the nature of which will be apparent from the following extract from her petition dated 3rd October, 1955.

" I sent a petition to you on 26th September, 1955, immediately on my suspension setting forth my case in so far as it is possible, without having before me any of the relevant papers or materials on which a grave charge is sought to be made out against me on mere suspicion. I therefore requested that all the available materials on which such a charge was sought to be made out against

me might be supplied to me without delay. I have not yet received a reply to the same nor copies of the materials asked for."

On 3rd October, 1955, she wrote again asking that she be supplied forthwith with all the materials she had asked for in her petition, dated 26th September, 1955.

On 5th October, 1955, Mr. Pushparaj sent the following reply :

" Kumari C. Gabriel is informed that materials relating to the case in the form of original documents cannot be furnished to her. She is therefore directed to appear before the Regional Director on 10th October, 1955, at 11 A.M. to peruse the relevant records which will be made available to her at the office of the Regional Director ".

On 10th October, 1955, Miss Gabriel wrote back as follows :

"I beg to state that I have not asked in my petition, dated 26th September, 1955, to be furnished with the original documents relating to the above matter. I have only requested to be furnished with the true copies of the same, except as regards the covers alleged to be written in my handwriting. In regard to the latter I can only ask for inspection of the originals to be given to me along with my legal adviser. I am advised that this is my elementary legal right and you, sir, having been a lawyer yourself, cannot be unaware of this. As you know well there are very great disadvantages in getting mere inspection in your office and it will be of little use to me in properly replying to a grave charge against me, and also to any legal adviser. I am led to think from your denial to furnish copies which is a natural right of any one accused of a grave offence, that prejudice seems to prevail even at the outset when there ought to be fairness and open-mindedness."

On the same day Mr. Pushparaj informed the petitioner :

" With reference to her letter No. Nil, dated 10th October, 1955, Kumari C. Gabriel is hereby informed that true copies of the documents and other records in the case cannot be sent to her as requested for in the above reference. She is further informed that legal advisers are not allowed to appear in departmental enquiries, and that she could herself come and peruse the documents, which will be shown to her by the undersigned. For perusing the documents she may appear before the undersigned at 11-30 A.M., at his office on any day between the 12th and 14th of this month."

On 14th October, 1955, the petitioner went to the Office of the Regional Director to inspect the documents. What happened at that time is a matter of acute controversy between Mr. Pushparaj and the petitioner. The view of Mr. Pushparaj is set out in paragraph 8 of his order :

" Accordingly the delinquent clerk, Kumari C. Gabriel, came to my office on the 14th October, 1955 and had inspection of the pseudonymous petition and also the postal envelopes in question in which copies of the petitions were received by several persons. Before I allowed her to have inspection of the documents, I took the precaution of asking two of my officers, *viz.*, the Assistant Director of Training, Shri M. D. Naik, and the Inspector of Training, Shri T.R. Doss, to be present in my room as witnesses to the inspection so that the delinquent clerk may not later on say that she was not given any fair opportunity to inspect all the relevant documents she wanted to see. The inspection went on for fully one hour from 12-30 to 1-30 P.M. I placed the entire file containing the several copies of the pseudonymous petition and the covers and asked her to go through them. She read through a petition and made some notes on a sheet of paper. After that she carefully examined the postal covers in question. Then I gave her a few sheets of paper and asked her to take down to my dictation some of the addresses on the envelopes in question, which I read out to her. After having fully inspected all the records she wanted to see, the delinquent clerk recorded an acknoweldgment on my office file as follows :

" As permitted by the R.D., I inspected the petition to-day at 12-30 P.M. to 1-30 P.M. I was also allowed to see the envelopes. I wrote to the dictation of the R.D certain addresses of the envelopes. I had inspection of the above records in the presence of the R.D., the A. D. T., Shri Naik and I.T., Shri Doss."

According to the petitioner, however, what happened was something very different. At that time she had been consulting Mr. Tarwady, and on 16th October, 1955, she went and told him what had taken place on 14th October, 1955. On his suggestion she put down in writing what had happened. That was on 17th October, 1955. On 18th October, 1955, Mr. Tarwady sent a copy of this to Mr. Pushparaj. The written report which Miss Gabriel gave to Mr. Tarwady runs as follows :

" *Ref.*—My interview with you on 16th October, 1955. As advised by you I give below a report regarding the interview I had with Shri P. K. Pushparaj, the Regional Director of Resettlement and Employment, Madras, at his office on the 14th instant. The Regional Director had asked me to appear before him at 11-30 A.M., on the 14th instant to inspect the papers in connection with my suspension. He came to the office only at about 11-35 A.M., and after he settled himself in his seat I sent

in my card to him. He called me after 12 A.M. As I went in he asked me why I did not wish him "Good-morning". "Have you even forgotten that"? "I have become so unlucky". Then he took out the case file and thought for a while and asked me to wait outside for some time. I waited. At about 12-30 P.M., he called me again. There were two other Officers as his witnesses. One was Shri M. D. Naik, the Assistant Director of Training and the other was Shri Doss, the Inspector of Training. He offered me seat by the side of his table on the right. He told me that he could show me only a few things such as the petition and the covers. He kept the file with him and gave me a copy of the petition and asked me to peruse. When I was about to take down some notes he first objected to it, but later consented. While I was thus going through the petition he remarked that "it is no use perusing it now since you already know it". I said, "If I had seen it, I would not have come". Then he said that "there is no use of doing all these things. I want to know who has done it." I told him that "since you are my prosecutor it is up to you to prove it." He said, "Oh yes, I have enough of them." I said, "I would like to see them" to which he said nothing. After I finished with the petition, I asked for the covers. Immediately he gave me a sheet of paper and asked me to write down certain passages from the petition to be dictated by him (he just showed me from a distance) and that I should sign it. I said I had not gone there to make any statements, etc., and that I could not do it. He flared up. He started abusing me: "Oh no, you have come with tactics, do you dare refuse to do it? You are only a subordinate, a clerk. I am carrying out the orders of the D.G.R.E. (Director General of Resettlement and Employment). If you refuse leave here". He threatened me that he would proceed against me, he will record everything against me, he will punish me, etc. He said in so many words all of which I am not able to recall at present. He actually shouted at me so furiously I did not know what to do, whether to do it or come away. When at last he said that I had to write the addresses of the several covers to his dictation and that if I refused he would consider me to be guilty. Finally, I decided to write. He dictated. Sir, I frankly confess that I was so frightened and nervous I could not write steadily. It was really a struggle. He started scolding me for each word I wrote. He made me rewrite the whole thing. He insulted me saying that I was disguising my handwriting. I was scribbling, he called me dishonest. He was very rude and cruel. Finally, he made me sign all the sheets. Then he showed me the covers from a distance when I said that they were not my handwriting. He again started talking rudely and insultingly. He has also filed a post card and a cover written by me. He asked me to identify them. When I did that he asked why I had printed the address on the cover, with any motive or no. I said with no motive. He was again furious. I asked why I should not write like that, to which he replied: "Oh yes, you can write, you are capable of writing in many ways". Then I asked for the evidences given by the writnesses. He said they will not be given to me, they will not be furnished even to the Court. I asked whether there is any report from the Finger Print Expert. He said no, besides they haven't got any value. They will not be accepted even at the Court. They will not be given even to the Court. He finally made me sign a statement on the file to the effect that the papers were shown to me by him on that day and that I was permitted to peruse them in the presence of those two officers mentioned above. I was with them from 12-30 to 1-30 P.M. This statement was also signed by the two witnessing officers. So, I came away. I felt that he would have even done me some harm to my person had it not been for the presence of those two men. Such was the fury with which once or twice he got up from his seat and shouted at me. Well sir, I think I have given you a sufficient idea as to what I had experienced on that day. I leave it to you as to the action to be taken in the matter. I only request you to protect my fair name. I once again affirm that I am innocent. I have no knowledge whatsoever about the affair."

In the letter which Mr. Tarwady wrote to Mr. Pushparaj on 18th October, 1955, he stated among other things;

"It is quite evident from the correspondence that has passed between her and yourself and her treatment when she called at your office for taking inspection pursuant to your memo. of 10th October, 1955, that she cannot have an impartial enquiry at your hands and she should look to the higher authorities, or eventually to the Courts of law for vindicating herself against the wanton attacks on her fair name and clerical record. You have chosen to deny her the ordinary and elementary privilege available to any accused, however serious the offence may be, that is, denying her the copies of the anonymous petition and other data relied upon by you and that too, when you have made up your mind against her, as it is evident from the paragraph 2 of the proceedings, dated 17th September, 1955, which runs thus:

'The Regional Director is satisfied that there is a *prima facie* case against Kumari C. Gabriel in that she has herself sent out these typewritten petitions over a pseudonymous name and that she has been indulging in this sort of subversive activities with intent to insult, annoy, defame and bring into disrepute some of the officers of this organisation.' And have even gone to the extent of suspending her.

. . . . .

It is the elementary principle under the Indian Evidence Act that in such circumstances one has to prove that those covers contained these petitions and the authors of the petition and the envelopes were one and the same person, but in this case even the address on the envelopes shown to our client

from a distance, is not in our client's handwriting. But our client was constrained to write a few addressses to your dictation, which you probably did for the purpose of comparison. But, our client highly resents your conduct in doing so and characterises it and the other ill-treatment as third degree methods. You are in the position of a judge for the purpose of enquiry and you assume the role of a prosecutor besides your having already pre-judged the issue."

The letter ended as follows:

" On 20th October, 1955, Miss Gabriel submitted an explanation in which after referring to the notice issued by her counsel on the 18th she went on to say:

The corsory glance at the copy of the alleged letter which I had at the inspection, leaves absolutely no doubt in my mind that its authorship can never be imputed to me by any stretch of imagination or straining of language. The content, if I am not mistaken, relate to several officers and persons whom I have not served or known, much less can I have any grievance against them as to prompt me to write the alleged letter. The unsullied record of my service for the past several years knocks the bottom out of the suspicion which you entertain against me and does not warrant the ill-treatment to which I have been subject to by suspending me and by denying me the copies of the letter or the data which you are supposed to have.

I submit that in the circumstances of this case set out more particularly in my previous noticer to you with the enclosure, I cannot have an impartial enquiry at your hands or get justice done to myself. This matter must be investigated, if at all by an absolutely independent body nominated by the Directiror-General of Ressettlement and Employment, New Delhi."

This explanation contained a statement which has an important bearing on the guilt or otherwise of the petitioner, but, which nevertheless, does not appear to have been investigated. The petitioner stated that the pseudonymous communication contained allegations against several officers and persons under whom she had never served and whom she did not know. It will be appreciated that if this statement is true it would be an important—almost decisive—circumstance in favour of the petitioner. But, in spite of the fact that this matter was kept pending for more than a year, this aspect of the case was not investigated. It should not have been difficult at all to ascertain who the officers were under whom the petitioner had worked and under whom she had not.

On 4th November, 1955, Mr. Pushparaj wrote to Messrs. Mehta and Tarwady that he could take no notice of their letter, dated 19th October, 1955, as the enquiry relating to the petitioner was a purely departmental matter. He went on to say that the allegations which the petitioner had made about what happened on 14th October, 1955, were

" a wholsale travesty of truth and contains a string of downright lies and deliberate false statements. Her allegations that she was abused, insulted and treated rudely and cruelly are utterly false and unfounded as facts to the contrary will be vouched for by two Gazetted Officers who are her immediate superior officers and who were present as witnesses when she was interviewed by the Regional Director on 14th October, 1955, allowed to peruse the relevant records. Serious notice is also being taken of her false allegations and insinuations against the Regional Director who is her employer and the head of the organization in this Region and who is also the competent authority to take disciplinary action against her."

Two things emerge from this letter. One is that Mr. Pushparaj and Miss Gabriel had plainly joined issue as to what happened on 14th October, 1955. The other is that Mr. Pushparaj was quite angry with the petitioner.

On 14th November, 1955, Mr. Tarwady wrote to Mr. Pushparaj a letter in which he stated *inter alia* :

"However, it makes the matters still worse and goes conclusively to establish the apprehensions of our client that the enquiry will not be impartial, when the elementary principles of natural justice are being violated.

Our client wants hereby to re-affirm and reiterate *in toto* what all has been stated both in our notice to you of 18th October, 1955 and her enclosed written statement as to what transpired at the interview, being undeterred by your threat of taking serious notice of her conduct in placing the true facts by (*sic*) her those writings and your purported to be borne out by your own subordinate officers, whether they be gazetted or of any rank. After all, they are your subordinates and without meaning any disrespect to them, it remains to be seen what weight will be attached to the evidence of those officers in the context of this case.

The travesty of truth alleged against our client is hereby denied and our client states that it is at the other end. In short, your reply was an expected and a foregone conclusion in view of your previous attitude and the decision and that is why our client wants an impartial enquiry by a person other than yourself. But your not doing so in spite of our client's requests and persisting in your present attitude, gives rise to a cause of action for our client to apply for appropirate writ in the matter and she will be doing so before long. Our client still challenges your competency to conduct the enquiry in the matter in as much as you both a prosecutor and a judge having already made up your mind against our client."

On 6th December, 1955, Mr. Pushparaj framed two further charges against the petitioner. The memo. containing the charges runs as follows :

"The Regional Director of Resettlement and Employment, Madras, received on the 29th October, 1955, a letter from Advocates Messrs. Mehta and Tarwady, Madras, under the instructions of their client Kumari C. Gabriel, Junior Clerk (under suspension), Assistant Director's (Training) Office, enclosing a copy of a statement of Kumari Gabriel in regard to what is said to have transpired at her interview on 14th October, 1955, with the Regional Director of Resettlement and Employment, Madras, at Regional Director's Office. The advocates issued a notice to the Regional Director of Resettlement and Employment calling upon him to put their client Kumari Gabriel forthwith in *status quo ante* cancelling the suspension order, and, threatening that if no proper amends were made, they would be constrained to take up the matter to the proper authorities to vindicate her innocence. From the statement of Kumari Gabriel given to the advocates regarding the interview she had with Regional Director on 14th October, 1955, it is observed that it is a travesty of facts and that it contains a string of downright lies and deliberate false statements. When Kumari Gabriel reported to Regional Director on 14th October, 1955, she was treated with due consideration and courtesy. Although she is a Lower Division Clerk, Regional Director gave her a seat on the right side of his table to enabl eher to peruse the records. At that time the Assistant Director of Training and Inspector of Training were also sent for and they were present in the Regional Director's room as witnesses. Regional Director gave her a copy of the petition containing the allegations against some of the Officers and staff of this organisation for her perusal. After perusal, she made some notes of her own on some sheets of paper. Her statement *inter alia* that the Regional Director of Resettlement and Employment asked her to write down certain passages from the petition dictated by him is a deliberate falsehood. No dictation from the petition was given to her but she was asked to write down to his dictation some of the addresses from the postal covers in which the petitions were received. Her allegation that the covers were shown to her from a distance is yet another falsehood. The file containing the petitions and covers was actually placed in front of her and the distance between her eyes and the postal covers she wanted to examine 'was barely a foot. She was given every opportunity to examine the relevant records closely and she has also acknowledged this fact on the file and signed the note. The above facts were testified to by the two Gazetted Officers of the Training Side who were present throughout during the interview. Therefore, her allegations against the Regional Director that she was insulted, abused and threatened during the interview are absolutely false, baseless and vexatious, and, clearly disclose the insubordinate, arrogant, impudent and reprehensible conduct of Kumari Gabriel.

In view of the above, the following further charges are, therefore, framed against her for good and sufficient reasons :—

1. that she, Kumari Gabriel in her statement, dated 17th October, 1955, addressed to Shri Tarwady, her advocate which was communicated to the Regional Director, has made false, vexatious and insinuating allegations against the Regional Director, her employer and the Head of the Organisation in the Region, knowing them to be false, and

2. that during the pendency of a departmental enquiry she issued a lawyer notice to the Regional Director of Resettlement and Employment, the Head of the Organization, to reinstate her when she has all the avenues open to her to represent her case in the course of the departmental enquiry and thus acted contrary to all principles of discipline and conduct as a Government servant disregarding the departmental procedure.

Kumari C. Gabriel is, therefore, hereby directed to show cause within 10 (ten) days of the receipt of this memo. why severe disciplinary action should not be taken against her on the above charge of false allegations, insinuations and grave misconduct.

If the explanation called for is not received within 10 (ten) days of the receipt of this memo., it will be presumed that she has no explanation to offer and orders will be passed on the merits of the case."

It will be noticed that the charge does not specify what particular rule in the Government Servants Conduct Rules the petitioner contravened in taking legal advice and getting her lawyer to send a notice.

On 13th December, 1955, Miss Gabriel wrote pleading not guiltv and protesting that her report to Mr. Tarwady about what happened on 14th October, 1955, was strictly correct and that to seek legal advice cannot be construed as misconduct or aggravation of misconduct. She went on :

"I reiterate that I am innocent and also my stand that the Regional Director being one of the persons maligned under the pseudonymous petition and exasperated by my explanations and the subsequent correspondence, has no jurisdiction to proceed with even the departmenal enquiry. If in spite of this he does so, I cannot get any justice at his hands and the result will be a foregone conclusion."

On 2nd December, 1955, Mr. Pushparaj sent to the Government Examiner of Questioned Documents at Simla the envelopes in which copies of the pseudonymous communications had been received together with specimen scripts of the petitioner. At the investigation which Mr. Pushparaj conducted, some of the witnesses had stated that the handwriting on some of the envelopes resembled that of Patro, the Superintendent of the Regional Employment Exchange. So, some specimens of his handwriting were also sent to the Examiner of Questioned Documents. On 30th April, 1956, the Examiner of Questioned Documents expressed this view :

"In my opinion there are indications that the person who wrote the red-enclosed writings stamped and marked S-16 to S-49 also wrote the red-enclosed writings similarly stamped and marked Q-1 to Q-11."

Meantime Miss Gabriel filed W.P. No. 947 of 1955 in this Court for quashing the order of suspension that had been made against her. That petition was dismissed *in limine* on 5th December, 1955, on the ground that an order of suspension is not a punishment and that the Regional Director of Resettlement and Employment had jurisdiction to place the petitioner under suspension pending enquiry into the charges that had been framed against her.

On 13th February, 1956, the petitioner wrote to Mr. Pushparaj complaining about the delay in holding the enquiry and pointing out that she had been under suspension from the 20th September, 1955 and that the order in Writ Petition No. 947 of 1955 had directed that she could seek appropriate relief after final orders had been passed against her in the departmental proceedings.

To this she received the following reply :

"Kumari C. Gabriel, Junior Clerk, Assistant Director of Trainings Officer, under suspension is informed that further investigations are being pursued in the matter and that as soon as the investigations are completed, an enquiry will be held and final orders will be passed."

On 27th February, 1956, the petitioner wrote protesting against the delay and pointing out that even as far back as 17th September, 1955, when she was placed under suspension Mr. Pushparaj had expressed the view that he was satisfied that a *prima facie* case had been made out against her. She also drew the attention of Mr. Pushparaj to a report in the "Mail" of a decision of a Bench of this Court relating to the grant of copies. On 9th April, 1956, the petitioner wrote again complaining about the delay in spite of her repeated reminders. On 19th April, 1956, the petitioner was informed

"that the case is still under investigation at various angles and as soon as it is finalised, her case will be taken up for final enquiry and orders."

On 23rd April, 1956, the petitioner wrote to Mr. Pushparaj pointing out that his reply of the 19th stating that the matter was still under investigation showed that the order of suspension was illegal, invalid and *ab initio* void and *mala fide*, and, she ended.

"The whole thing is untenable, unwarranted but only prestige stands in the way of dropping the proceedings against me, who is innocent."

On 5th May, 1956, Mr. Pushparaj sanctioned subsistence allowance and dearness allowance to the petitioner. On 7th May, 1956, the petitioner wrote to Mr. Pushparaj taking exception to certain statements appearing in the orders granting subsistence allowance. She said :

"I have not made any representation as alleged in my letter of 23rd April, 1956, regarding the subsistence allowance sought to be given to me in your last two communications as late as May, 1956, while I am starved since September, 1955, without any just or sufficient cause.

"Please note that I will receive the amount only without prejudice to all my contentions and the contemplated proceedings."

On 5th June, 1956, Mr. Pushparaj informed the petitioner that he would hold an enquiry on 25th June, 1956 and directed the petitioner to appear before him with all her evidence, oral and documentary. The letter specifcally stated that she would not be permitted to take any legal adviser with her as legal advisers were not allowed to appear in departmental proceedings. In answer to a letter which the petitioner wrote on 11th June, 1956, Mr. Pusparaj replied.

" Kumari C. Gabriel is informed that a copy of the pseudonymous petition sent by her in the several covers addressed to various individuals in the organisation and the covers addressed in her own handwriting have already been shown to her previously at the Regional Director's Office on 14th October, 1955, when she was given every opportunity to inspect and take notes of all the documents in question. Hence there are no other papers to be frunished to her."

On 22nd June, 1956, the petitioner wrote to Mr. Pushparaj complaining that she was entitled to every reasonable opportunity to defend herself under the Rules and that her request in that connection had not been complied with. She controverted the statement in paragraph 1 of the letter of Mr. Pushparaj, dated 15th June, 1955, that she had been given every opportunity to inspect and take notes of all the documents in question. She also complained that she had not been furnished with the list of witnesses for the prosecution, nor with copies of the earlier statements that had been taken from them. She also pressed that she should be permitted to have the assistance of her legal adviser in view of the fact that she is a woman and that some of the witnesses happen to be her official superior. She also pressed that the enquiry should not be conducted by Pushparaj.

On the same day Mr. Pushparaj sent a memo. explaining that no useful purpose would be served by sending copies of the envelopes in which the pseudonymous communications had been received and that the statements recorded from the witnesses at what he called the preliminary investigation could not be furnished to her. He, however, gave the assurance that she would be given full opportunity to examine the statements at the time of enquiry "in the presence of the Regional Director of Resettlement and Employment, Madras and the witnesses." She was again told that she could not engage a legal adviser and that the enquiry would not be conducted by any one else. She was also given a list of ten persons whom it was proposed to examine.

On 25th June, 1956, the enquiry commenced. The petitioner then appeared and handed over a statement complaining that the refusal to furnish copies was contrary to the rules and opposed to the principles of natural justice. She said :

" If copies of such records are not furnished to the accused, especially when a grave charge is levelled against, and no opportunity is given to the accused to study those records and be in a position to accept or attack these materials......there is no use for the accused to attend the so-called enquiry quite unprepared......No Court on earth will allow all the prosecuting witnesses to assemble at one time when each one of them is being examined............The conduct and proceedings of the enquiry held by the Regional Director on 14th October, 1955, when I appeared singly against a team of witnesses on the other side and the treatment accorded to me then makes me shudder even now and prevent me from facing the enquiry unprepared and undefended a second time conducted by the same officer and attended by a set of his own subordinates........I am therefore constrained not to participate in such an unfair, biassed and illegal enquiry........."

After handing over this memorandum she mentioned that it contained what she wanted to say and that she would not cross-examine any witness. *Vide* paragraph 18 of the order of the Regional Director. After that she enquired whether she could go away. Mr. Pushparaj told her that he had fixed that day for the enquiry, that most of the witnesses were present, and, that if she was interested in proving her defence it was for her to decide whether she would stay and cross-examine the witnesses or go away. The petitioner then decided to stay on, and, in her presence, five witnesses were examined. The petitioner, however, did not cross-examine any of them. The enquiry was adjourned to the 26th. On that day three more witnesses were examined. The matter was then adjourned to the 9th July, 1956. Notice of the adjourned date was given to the petitioner.

On 30th June, 1956, the petitioner wrote complaining about the way the enquiry had been handled and in particular taking exemption to

"putting into the mouths of the witnesses whatever you deemed necessary for your purpose and taking it down in your own language".

On 9th July, 1956, the enquiry was adjourned to the 10th. The petitioner was absent that day. On 11th July some more oral evidence was recorded and on that date too the petitioner was absent. The proceedings were then adjourned to the 20th. Intimation of this was sent to the petitioner on 12th July, 1956. In reply to that the petitioner wrote on 16th July, 1956, drawing attention to a letter he had sent on the 30th June and repeated that no useful purpose would be served by her attending the enquiry on the 20th if she could not have the assistance of her legal adviser.

Though the petitioner was notified that the enquiry would be held on the 20th still on 18th July, 1956, Mr. Pushparaj recalled one Jayapalan, a witness whom he had examined on 26th June, and recorded his evidence touching an incident mentioned by another witness in the course of his evidence on 10th July, 1956. Notice of this date was not given to the petitioner. On 20th July, 1956, some more oral evidence was taken when too the petitioner was not present.

Meantime the Government of India decided to implement a decision which they had taken earlier to transfer the day-to-day administration of the Employment Exchanges and Training Centres under their control to the respective State Governments.

On 25th July, 1956, the Regional Director of Resettlement and Employment sent a notice to the petitioner in which she was told,

"consequent to the decision of the Government of India to transfer the day-to-day administration of the Employment Exchange Training Centres to the State Governments, a number of existing posts of Junior Clerks in the Resettlement and Employment Organization of the Ministry of Labour will be abolished and the services of a corresponding number of office staff will be dispensed with. Kumari C. Gabriel, Junior Clerk, Office of the Assistant Director of Training, Madras, is hereby informed that she is one of the employees, whose services will, on the abolition of the said posts, be dispensed with and she is accordingly given notice that her services will not be required with effect from 1st November, 1956. If she wishes to avail herself of the terminal benefits of her service under the Government of India, she should apply for such benefit forthwith, so that the period of notice and the period of terminal leave admissible to her, if any, may run concurrently".

It may be mentioned here that one complaint of the petitioner in respect of this notice is that her services were dispensed with straightaway while others who were in the same category as she was and who were junior to her were given an option to opt for service under the State of Madras.

On 6th October, 1956, Mr. Pushparaj drew up an order finding the petitioner guilty of all the charges framed. A copy of this was communicated to the petitioner and she was called upon to show cause why she should not be dismissed. The petitioner submitted an explanation on 19th October, 1956, which, according to Mr. Pushparaj, was merely a repetition of the "usual untenable arguments and baseless and wild criticism of my action and the procedure adopted by me."

On 22nd October, 1956, Mr. Pushparaj passed an order dismissing the petitioner from the service of the Government of India with immediate effect.

To complete the statement of facts it is necessary to add that on 27th October, 1956, a memo. was served on the petitioner informing her that her services would not be required with effect from the afternoon of 31st October, 1956.

The present petition has been filed to quash the order, dated 22nd October, 1956, that is to say, the order of dismissal.

In the petition as originally filed the second respondent was entered as the Regional Director of Resettlement and Employment at No. 8, Haddows Road, Nungambakkam. Subsequently, in consequence of a letter addressed by the Additional Government Pleader, the second respondent was entered as the Commissioner of Labour, Chepauk, Madras.

A single counter was filed on behalf of all the respondents. In that the point was taken that

" the petitioner was never under the services of the State of Madras and, therefore, the State of Madras could not be made a party to the main petition and no relief could be granted to the petitioner.

With regard to respondents 2 and 3, I say that the Office of the Regional Director of Resettlement and Employment, Madras, is closed and there is no authority within the jurisdiction of this Hon'ble Court, upon whom any writ could be issued. With regard to the third respondent, I say that the third respondent is also at Delhi, and, therefore, is outside the jurisdiction of this Hon'ble Court, and therefore, the petition of the petitioner is incompetent and this Hon'ble Court has no jurisdiction to grant any relief."

Though these points have been taken in the counter, they are really without substance. The learnd Advocate-General himself with characteristic fairness, drew my attention to the decision of the Supreme Court in *Hari Vishnu* v. *Ahmad Ishaque*[1]. In paragraphs 10 and 11 of the Judgment the nature of a writ of *certiorari* is explained.

" It is not a proceeding against the tribunal or an individual composing it ; it acts on the cause of proceeding in the lower Court, and removes it to the superior Court for reinvestigation.

The writ for quashing is thus directed against a record, and as a record can be brought up only through human agency, it is issued to the person or authority whose decision is to be reviewed. If it is the record of the decision that has to be removed by '*certiorari*', then the fact that the tribunal has become '*functus officio*' subsequent to the decision could have no effect on the jurisdiction of the Court to remove the record. If it is a question of issuing directions, it is conceivable that there should be in existence a person or authority to whom they could be issued, and when a '*certiorari*' other than one to quash the decision is proposed to be issued, the fact that the tribunal has ceased to exist might operate as a bar to its issue. But if the true scope of '*certiorari*' to quash is that it merely demolishes the offending order, the presence of the offender before the Court, though proper, is not necessary for the exercise of the jurisdiction or to render its determination effective."

In the counter to the petition the further point was taken that the Writ Petition would be infructuous. I quote the relevant passage :

" With reference to the said contention, I say that the office in which the petitioner was working is closed and the whole establishment is handed over to the State of Madras. As a result, therefore, of the transfer of the said organization, all the employees were served with notices of termination of services. The petitioner was also served with notice, dated 25th July, 1956, terminating the services of the petitioner in the ordinary course as well with effect from the afternoon of 31st October, 1956. As the enquiry in the petitioner's case was pending I say, that in view of the above, the petition has become entirely infructuous."

I am unable to agree that the petition has become infructuous. For one thing, if the order of dismissal were to stand that would be a stigma attaching to the petitioner which is inevitably bound to handicap her in her subsequent efforts to get employment or redress. If the order of dismissal is set aside the petitioner would be in a position to appeal to the good conscience and sense of fairplay of the appropriate authorities.

It will not therefore be correct to say that the petition must fail on the ground that it is infructuous.

These preliminary objections being out of the way, it is now possible to go into the question whether the order complained of should be quashed or not.

All enquiries, judicial, departmental or other, into the conduct of individuals must conform to certain standards. One is that the person proceeded against must be given a fair and reasonable opportunity to defend himself. Another is that the person charged with the duty of holding the enquiry must discharge that duty without bias and certainly without vindictiveness. He must conduct himself objectively and dispassionately not merely during the procedural stages of the enquiry, but also in dealing with the evidence and the material on record when drawing up the final order. A further requirement is that the conclusion must be rested on the evidence and not on matters outside the record. And, when it is said that the conclusion must be rested on the evidence, it goes without saying that it must not be based on a misreading of the evidence. These requirements are basic and cannot be whittled

1. (1955) 1 M.L.J. 157 : (1955) S.C.J. 267 : (1955) 1 S.C.R. 1104 : A.I.R. 1955 S.C. 233 at 241 (S.C.).

down, whatever be the nature of the enquiry, whether it be judicial, departmental or other. However, where the enquiry is judicial we insist that yet another requirement should be complied with. That is contained in the familiar statement that it is not sufficient that justice is done, but that justice should also manifestly appear to be done.

Going back to the first requirement, *viz.*, that the person proceeded against must be given a fair and reasonable opportunity to d fend himself. This requires that he should be given facilities to examine and study the documents sought to be put in evidence against him, and, if he desires to take notes or extracts he should be allowed to do so without let or hindrance. Exceptions to this rule may have to be made in the interests of public safety or security or some such overriding ground, but such exceptions should be clearly rare. Susceptibilities of individuals, however highly placed, will not justify an exception being made to this rule. It is further necessary that the individual proceeded against should be given a fair and proper opportunity to cross-examine the witnesses who depose against him. In those cases where such witnesses have made statements relating to the charge prior to the enquiry, the statements must be made available to the person against whom the charge is preferred since without such statements it is impossible effectively to exercise the right of cross-examination. Normally this would require that copies of the statements made by the witnesses prior to the regular enquiry should be furnished to the person who is being proceeded against. If, for any reason, it is impossible to furnish him with copies he should be allowed to make out the copies for himself. Persons who are familiar with the conduct of criminal cases will realise the importance of this requirement. One of the most effective ways of assailing the credibility of a witness in the box is by showing that previously he has made statements which contradict those he is making in the box. It will also be a legitimate way of discrediting a witness to show that he has improved on his original story in one form or other. Neither of these perfectly legitimate modes of cross-examination can be employed if the earlier statements of the witnesses are not made available to the accused person. No counsel, however eminent and however resourceful he may be in the art of improvisation, can assist his client properly in a Sessions Court if he does not know what the witness has stated in the committing Court, and, to the investigating officer, and, where, as in a departmental enquiry, the accused person has no legal right to the help of counsel, the need for copies of the earlier statements would be mere imperative. The ordinary Government servant who has had no training at the Bar is bound to be inexpert in the art of cross-examination. To cross-examine properly he would have to study the earlier statements of the witnesses at leisure and note down the points on which he wants to question him, sometimes even to write out the entire questions he wants to put : To invite a person to cross-examine a witness while keeping back from him earlier statements made by the witness would be like blind-folding a man and asking him to find his way about. That is plainly and manifestly not just.

As soon as she was placed under suspension the petitioner wrote asking that she should be furnished with all the available material on which the charge was based and sought to be made out. She repeated her request on 3rd October, 1955. On 10th October, 1955, she pointed out her right to copies was a natural one. Nonetheless she was definitely told that copies would not be given. On 18th October, 1955, counsel for the petitioners wrote to Mr. Pushparaj pointing out that right to copies was " the ordinary and elementary privilege available to any accused, however serious the offence may be." On 22nd June, 1956, the petitioner reiterated her request for.

" copies of all the documents including statements recorded from any person in my absence."

To this she was told that copies would not be furnished. In spite of repeated requests made by the petitioner and by her counsel, Mr. Pushparaj did not furnish to her the copies of the statements of the witnesses.

It may be mentioned here that the rules regarding the conduct of departmental enquiries framed by the Government of India have for a long time contained provisions to this effect :—

" The Disciplinary Authority shall frame definite charges on the basis of the allegations on which the inquiry is proposed to be held. Such charges, *together with a statement of the allegations on which they are based shall be communicated in writing* to Government servant, and he shall be required to submit, within such time as may be specified by the Disciplinary Authority, a written statement of his defence and also to state whether he desires to be heard in person."

There is here an explicit direction, that a copy of the allegations on which the charges are based should be communicated to the Government servant against whom action is intended to be taken.

It is not therefore as though Mr. Pushparaj could find no guidance in the rules.

The learned Advocate-General, however, contended that the petitioner had suffered no prejudice by reason of the fact that she was not supplied with copies of the statements which the witnesses had made earlier. I find it difficult to agree. Apart from everything else the petitioner had no fair chance of eliciting from the witnesses' answers tending to show either that their opinions were hasty or ill founded. She had also no chance of showing that the opinion expressed by the witnesses were influenced by considerations of the displeasure of their official superiors. The earlier statements of the witnesses furnish a fair and wide field for cross examination.

I said a little earlier that one essential requirement of any enquiry is that the conclusions should be rested only on the evidence and that the evidence should not have been misread. One of the most important pieces of evidence in the present case was the opinion expressed by the Government Examiner of Questioned Documents. His opinion was that :

"there are indications that the person who wrote the red-enclosed writings stamped and marked S-16 to S-49 also wrote the red-enclosed writings similarly stamped and marked Q-1 to Q-11.

But this is how Mr. Pushparaj read and understood that opinion :

" The 34 specimen scripts containing the admitted handwritings of the delinquent clerk, Kumari C. Gabriel were marked by the Expert as S-16 to S-49 and the 15 specimen scripts of the Superintendent, R.E.E., were marked by the Expert as S-1 to S-15. The Expert has *expressed his definite opinion that the person* who wrote the red-enclosed writings in the specimen scripts S-16 to S-49 *also wrote* the writings in the Questioned Documents *viz.*, postal envelopes marked as Q-1 to Q-11.... *Thus it has been established by expert opinion* that the delinquent clerk, Kumari C. Gabriel is the person who wrote the addresses on the postal envelopes in question."

Now, this is an entirely erroneous reading of the opinion of the expert. The expert did not say anything of the kind which Mr. Pushparaj thought he did : It is clear that Mr. Pushparaj, misdirected himself on a very vital piece of evidence in the case.

Another subsidiary circumstance may be mentioned here. On 9th August, 1956 Mr. Pushparaj examined three additional witnesses whom, in paragraph 18 of his order, he described as important witnesses. The petitioner complained that the inclusion of these witnesses was an after-thought. To meet this plea Mr. Pushparaj relied on Annexure V, a note put by the Assistant Director on 26th July, 1955, and, on Annexure VI, a report made to Pushparaj on 27th July, 1955. The record does not show that either of these documents was exhibited in the case, and, of course, no copy of either of these documents was furnished to the petitioner.

The position, therefore, is that Mr. Pushparaj took into consideration documents not marked in evidence and more important documents withheld from the accused and that she was not given an opportunity to meet and explain—I was told that Mr. Pushparaj was a District Munsif in the earlier stages of his official career. A person with that experience must surely have been aware of the difference between documents which have been exhibited and those which have not been exhibited. He must also have been aware that it is not permissible to use against a person evidence oral or documentary, which has been kept back from him.

Mr. Tarwady, the learned Advocate for the petitioner, very strongly argued that Mr. Pushparaj did not deal with the case in a dispassionate and objective manner.

He so to speak jumped into the fray and made the issue a personal one as between himself and the petitioner. The material on record fully justifies that criticism. It is clear that the petitioner was placed under suspension before the investigation was complete. No doubt in the course of departmental proceedings situations arise when it becomes necessary to place an officer under suspension pending the preliminary investigation or subsequent regular enquiry into his conduct. The reason which Mr. Pushparaj has set out in paragraph 4 of his order for placing the petitioner under suspension before even the investigation was complete is this :

> " Her contention that the suspension was a punishment is incorrect. As the head of the office and appointing authority competent to take departmental action against Class III staff, I placed her under suspension as I apprehended that if she were allowed to continue in the office she might tamper with records which contained her handwritings, and that her presence will not be conducive to further investigations."

I find it difficult to recognise any validity in either of the grounds given. The petitioner had been working in the office for a very considerable time. And, even if she had been so minded, it would have been physically impossible for her to tamper with or destroy all the records which contained her handwriting. If Mr. Pushparaj had any such fears he should not have had difficulty in placing in safe custody an adequate number of the files or papers which contained the handwriting of the petitioner. The second ground assigned, *viz.*, that the presence of the petitioner in the office would not be conducive to further investigation, becomes difficult to understand except on the assumption that the official witnesses who gave evidence relating to the handwriting of the petitioner could not be depended upon to speak the truth if she continued in the office. If I understood Mr. Tarwady right on this part of his case, his suggestion was that Mr. Pushparaj was trying to overawe the officials subordinate to him and who were working in his office to ensure that they would adhere to the statements that he had previously obtained from them. It will be noticed that in this case the petitioner was placed under suspension long before the investigation was completed : she was placed under suspension on 17th September, 1955, it was only on 2nd December, 1955, *i.e.*, about two and half months later that Mr. Pushparaj even sought the opinion of the first examiner of questioned documents and that *opinion* was received only in May, 1956. To place an official under a suspension pending an enquiry is ordinarily regarded as a very serious step to take. That Mr. Pushparaj took this step months even before the preliminary investigation was complete lends support to the criticism that he was acting vindictively.

For the purposes of disposing of this writ petition it is not necessary to decide whose version regarding what happened on 14th October, 1955, *viz.*, whether the version of Mr. Pushparaj or that of the petitioner, is right. In fact in writ proceedings this Court cannot investigate controversial questions of fact. But out of of the events which are said to have happened that day one fact stands out. The petitioner had gone to the office to inspect the documents and Mr. Pushparaj took advantage of the occasion to make the petitioner write down the names and addresses found on some of the covers exhibited in the case. I have no doubt that this was a very unfair thing to do. It was an attempt to obtain from the petitioner evidence that could subsequently be used against her. Be it remarked that the petitioner was then under suspension and she had gone to the office in order that she might examine the documents in order to furnish her explanation. The petitioner was hardly in a position to stand up for her rights. Mr. Pushparaj had taken the precaution a very unusual one of securing the attendance of two of his gazetted subordinates at that time. It is in that situation that he called upon her to write down the addresses on some of the covers. I find it hard to resist the impression that he was in a manner of speaking, trying to trap the petitioner.

The letter which Mr. Pushparaj wrote to Mr. Tarwady on 4th November, 1955, very definitely indicates that he had stepped into the fray. In that letter he described the account which the petitioner had given to Mr. Tarwady about what happened on 14th October, 1955, as

"a whole-sale travesty of truth and contains a string of downright lies and deliberate false statement—utterly false and unfounded—as will be vouched for by two gazetted officers—"

The second charge framed against the petitioner is that in her statement dated 17th October, 1955, addressed to Mr. Tarwady she had made "false, vexatious and insinuating allegations against the Regional Director". It is not easy to see how after having committed himself in such unmistakable terms to the views he expressed on 4th November, 1955, he could possibly have brought an impartial mind to bear on the charges against the petitioner. The very memorandum dated 6th December, 1955, in which two additional charges were framed against the petitioner furnish evidence of the state of mind of Mr. Pushparaj. He ended paragraph 2 of that memo. as follows :

"Therefore, her allegations against the Regional Director that she was insulted, abused and threatened during the interview are absolutely false, baseless and vexatious and clearly disclose the insubordinate, arrogant, impudent and reprehensible conduct of Kumari Gabriel."

This extract speaks for itself, and, I shall make no comment on it beyond saying that it makes manifest that Mr. Pushparaj had already made up his mind on the matter.

Further evidence to show that Mr. Pushparaj did not apply his mind to the case fairly and dispassionately is to be found in the very order he has written. See for example paragraphs 8 and 12 of the order. In paragraph 16 Mr. Pushparaj stated :

"She again challenged my authority and jurisdiction which she says were not vested in me that I was assuming the double role of a prosecutor and a Judge. She tries to justify her action in resorting to a lawyer for sending me, her employer and the Head of the organization in this Region, a lawyer notice threatening legal action".

Now, Mr. Pushparaj was not the employer of the petitioner. Her employer was the Government of India. This erroneous statement in the order is interesting only in that it shows what Mr. Pushparaj thought of himself and his position *vis a vis* the petitioner. That she should have dared to instruct a lawyer to send a notice to a person placed in the position of Mr. Pushparaj was in his eyes an almost unpardonable sin.

Further evidence of his state of mind is furnished by paragraph 28 of his order where he says :

"This lawyer's notice is couched in very improper and undignified language questioning my authority and challenging my jurisdiction and calling upon me to cancel the suspension order and contained a threat that the matter will be taken up with the higher authorities. The lawyer even went to the extent of saying that I have assumed the role of a Judge and a prosecutor at the same time and that I have prejudged the issues".

Mr. Tarwady next contended on the time which Mr. Pushparaj took to complete the investigation, hold the enquiry and pass final orders. He pointed out that the petitioner was placed under suspension on 17th September, 1955 and that the final orders were passed only in October, 1956, more than a year and a month later. He complained that the delay was deliberate and that Mr. Pushparaj was of set purpose pursuing a policy of harassing the petitioner and that he so timed his order that whatever the final result the petitioner would be thrown out of employment.

The question which Mr. Pushparaj had to decide was a quite simple question of fact, *viz.*, whether the handwriting on the covers which were received in the office and which contained the communications complained of was that of the petitioner. If we exclude the time taken to obtain the opinion of the Examiner of Questioned Documents, the entire matter could have been ordinarily concluded in a few weeks. Even in cases of murder the investigation by the police, the enquiry by the Committal Magistrate and the trial by the Sessions Judge are more often than not completed in six months and less. In the circumstances, Tarwady's complaint appears to be as well-founded. The alternative theory would be that Mr. Pushparaj was extraordinarily incompetent ; but when we see that when he wanted to, Mr. Pushparaj could act quickly enough.

I stated earlier that all enquiries of this kind should conform to certain minimum standards : but Mr. Pushparaj has diregarded every one of them. He has handled the entire proceedings in a manner that is repugnant to all canons of justice and fair play. The petitioner, it appears to me, has been the victim of his vindictiveness.

In the result the petition is allowed and the rule *nisi* made absolute.

The question of costs remains. On the merits of the case, the petitioner is undoubtedly entitled to her costs. But, my difficulty is this. The first respondent is the State of Madras and Mr. Pushparaj was not working under the State of Madras when he passed the order in question. The second respondent is the Commissioner of Labour and he too is not responsible for the order passed by Mr. Pushparaj. The third respondent who might have been saddled with costs is outside the territorial jurisdiction of this Court. Mr. Pushparaj could have been properly directed to pay costs, but then he has not been made a party. In the circumstances there will be no order as to costs.

R.M. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE BALAKRISHNA AYYAR.

Messrs. P. Orr & Sons, Madras .. *Appellant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), *section* 10 (2) (*xv*)—*Payment to secure the termination of Managing Agency rights held under a contract —If a permissible deduction.*

Where a payment was in form and substance one made to secure the termination of a managing agency and its attendant recurring annual liability to the company under a binding contract. *Held* : It was not intended to bring in any capital asset, nor did it result in the acquisition of any capital asset. The payment constituted an item of revenue expenditure.

Judged by the test of business expediency the amount was expended wholly and exclusively for the business of the assessee company.

That the person concerned benefited by the transaction is not proof that the sole object of the assessee company was that he should benefit.

The payment is a permissible deduction under section 10 (2) (xv) of the Income-tax Act, 1922. Case law discussed.

Assam Bengal Cement Co., Ltd. v. *Commissioner of Income-tax,* (1955) 1 S.C.R. 972 : 27 I.T.R. 34 and 35, referred.

Case referred to the High Court by the Income-tax Appellate Tribunal section 66(4) of the Indian Income-tax Act, 1922 (Act XI of 1922) in R.A. No. 1046 (Madras) of 1951-1952 on its file for decision on the following question of law, *viz.*,

"Whether in the circumstances of the case the payment of Rs. 1,25,000 to the Managing Agent of the Assessee-Company represented compensation for loss, of office and not deductible under the provisions of section 10 (2) (xv) of the Act ?"

M. Subbaraya Ayyar and *V. Sethuraman* and *S. Padmanabhan,* for Appellant.

C. S. Rama Rao Sahib, Special Counsel for Income-tax, on behalf of the Respondent.

The Judgment of the Court was delivered by

Rajagopalan, J.—The assessee company has been a private limited company from 1915. Even during the period from December, 1936 to June, 1938, when it was in form a public company, no shares were issued to the public.

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*Case Referred No. 8 of 1953. 28th October, 1958. (6th Kartika, 1880—Saka.)

After June, 1938, it reverted to its status as a private company. J. M. Smith was in management all through till March, 1950, and it was never in dispute that the present sound position of the Company was largely due to his management of its affairs.

The assessee company entered into a managing agency agreement, evidenced by Annexure A with Smith, Ltd. Smith, Ltd., consisted only of Smith and his wife as shareholders, with a nominal capital of Rs. 300. Under that agreement Smith continued to manage the affairs of the assessee company. Clause (1) of the agreement provided :

"The said private company, namely Smith, Ltd., and its assigns and successors in business notwithstanding any change in the name, style or constitution of the said private company, hereinafter called also the said managing agents, shall be managing agents of the company for a period of twenty years certain from the date of P. Orr & Sons, Ltd., becoming a public limited company *i.e.*, from the 24th day of December, 1936, until the 23rd day of December, 1956, and thereafter unless and until the said managing agents shall resign of their own accord or be removed from office by a special resolution of the company. . . . . it being expressly agreed that no question of removal from office of the said managing agents before the expiry of the period of twenty years aforesaid shall arise under any circumstances whatsoever save and except on the said managing agents being found guilty in a competent Court of law of fraud in the management of the business of the company or in the discharge of their duties as the managing agents of the company."

In addition clause 9 of the agreement provided :

"The said managing agents shall be entitled to delegate or sub-delegate all or any of the powers, authorities and discretions for the time being vested in them in particular from time to time to provide by the appointment of an attorney or attorneys for the management and transaction of the affairs of the company in such manner as they may deem fit"

The remuneration payable to Smith, Ltd., as managing agents was (1) a monthly allowance of Rs. 3,000 plus, (2) 25 per cent of the annual net profits of the company.

The managing agent's allowance and commission paid between 1943 and 1947 were as follows :

Year ended 31st March	*Managing agents allowance and Commission*
1943	.. 1,11,300
1944	.. 94,227
1945	.. 93, 374
1946	.. 94,696
1947	.. 60,446

Up to 31st March, 1947, Smith and his wife held between them a large block of shares (27,200) in the assessee company, which however was not enough to give them a controlling interest.

When exactly the Directors of the assessee company, which included Smith, first entertained the idea of converting the company again to a public company is not clear. Nor does the evidence on record indicate whether the Directors contemplated any increase in the issue of the subscribed capital, even after converting the company into a public company. The Directors obviously came to the conclusion that the termination of the managing agency agreement was desirable before any steps to that end could be taken. There must have been a general measure of agreement between Smith and the other Directors before the formal correspondence commenced between them with the letter marked Annexure B, dated 16th August, 1948.

Annexure B was the latter the Directors addressed to Smith, Ltd. The first paragraph of that letter ran :

"The Directors of this company have been considering for some time the advisability of your continuing as managing agents under the agreement entered into with you, dated the 15th February, 1937, in view of the proposal to make an offer of sale of shares to the public in the near future."

What was required of Smith was (1) the termination of the managing agency with retrospective effect from 1st April, 1948, which necessarily involved the loss of the managing agents' remuneration and commission payable for the year which commenced with 1st April, 1948, and (2) waiver of the right to the 25 per cent. commission earned during the year that ended with 31st March, 1948. In return Smith was offered a lump sum of Rs. 1,25,000. Smith was further offered a life directorship of the company, with charge of the London Office on a remuneration of £1,200 per year. By the time this letter was sent, the commission payable to Smith for 1947-1948 had not been ascertained. It was estimated at Rs. 31,000, but eventually it was found that Rs. 89,214 would have been payable under this head. Smith accepted the terms offered to him (Annexure B-1). The Directors thereupon informed the shareholders of the proposal to terminate the managing agency (Annexure B-2), dated 26th August, 1948. There was no reference in that letter, B-2 to any proposal to convert the company into a public company. The relevant portion of that letter ran :

"Subject to the approval of the members, your directors have proposed a capital payment as compensation for loss of office of Rs. 1,25,000 in return for the termination of the managing agency agreement with effect from the 1st April, 1948.

We are pleased to advise that this offer has been accepted by the managing agents.

It will be seen that the offer of Rs. 1,25,000 is approximately equal to the commission paid and payable for the three years ended 31st March, 1948, and is considered an excellent offer from the company's point of view as the agreement would not normally expire until the 23rd December, 1956".

These proposals were accepted by the shareholders of the company at the meeting held on 30th September, 1948. The share-holders decided further that after the death of Mr. Smith, his wife should get a pension for her life at £100 per month.

Thus the managing agency came to an end with effect from 1st April, 1948. Smith, Ltd., were credited with the sum of Rs. 1,25,000 in the assessee's books on 30th October, 1948. The assessee maintained its accounts on a mercantile basis. The sum itself was actually paid out later in instalments between 25th January, 1949 and 28th September, 1950.

In the assessment years 1949, 1950, for the year of account that ended with 31st March, 1949, the assessee claimed this payment of Rs. 1,25,000 as an allowable deduction under section 10 (2) (*xv*) of the Income-tax Act. That claim was disallowed by the Income-tax Officer. The assessee appealed with success to the Assistant Commissioner. The appeal preferred by the Department was allowed by the Tribunal. The Tribunal however, referred the following question under section 66 (1) of the Act :

"Whether in the circumstances of the case the payment of Rs. 1,25,000 to the managing agents of the assessee company represented compensation for loss of office and not deductible under the provisions of section 10 (2) (xv) of the Act".

In the appeal before the Tribunal it pointed out that two questions arose for consideration: (1) whether the payment of Rs. 1,25,000 constituted an item of capital expenditure, and (2) if it was an item of revenue expenditure, whether it was incurred wholly and exclusively for the purposes of the assessee's business. The Tribunal answered the first of these questions against the assessee, and it refrained from considering the second question. When the reference under section 66 (1) came up first before this Court, it directed by its order dated 17th April, 1956, the submission of further statement of the case with a specific finding on the second of the question mentioned above. In the further statement of the case submitted by the Tribunal it recorded :

"In the ultimate analysis we find that the reasons for the payment of the compensation in question are not business reasons motivated by any commercial consideration that was the urge to the transactions. The amount in question cannot therefore. . . . . be said to have been wholly and exclusively laid out for the purpose of the assessee's business for the year ended 31st March, 1949."

Apparently the Tribunal was of the view that no portion of this sum of Rs. 1,25,000 was expended wholly and exclusively for the business of the assessee. Had even a portion of that expenditure been incurred out of business considerations alone an apportionment would have had to follow on which the Tribunal did not embark.

In our opinion neither of the findings of the Tribunal was justified by the material it had to consider.

The approach to a problem of this kind is that laid down by the Supreme Court in *Assam Bengal Cement Co., Ltd.* v. *Commissioner of Income-tax*[1].

"The aim and object of the expenditure would determine the character of the expenditure whether it is a capital expenditure or a revenue expenditure. The source or the manner of the payment would then be of no consequence. It is only in those cases where this test is of no avail that one may go to the test of fixed or circulating capital. It has been rightly observed that in the great diversity of human affairs and the complicated nature of business operations it is difficult to lay down a test which would apply to all situations. One has therefore got to apply these criteria one after the other from the business point of view and come to the conclusion whether on a fair appreciation of the whole situation the expenditure incurred in a particular case is of the nature of capital expenditure or revenue expenditure in which latter event only it would be deductible allowance under section 10 (2) (xv) of the Income-tax Act."

Mr. Rama Rao Saheb, learned counsel for the Department was right when he pointed out that the object, to achieve which the assessee expended the sum in question (Rs. 1,25,000) should be gathered in this case from the circumstances attendant on the decision to pay, which was in August, 1948, and not from the subsequent events. In form and in substance the payment was to secure the termination of the managing agency held under a binding contract by Smith on behalf of Smith Ltd., Annexure B-2, which placed the proposal before the shareholders, made that quite specific. Annexure B-2 pointed out that eight years were still left of the 20 years' period for which the contract provided, and that the proposed payments represented but three years commission payable to the managing agents. We shall leave out of account the fact, that while the commission payable for the year ending 31st March, 1948, was then estimated at about Rs. 31,000 it actually worked out to over Rs. 89,000. The proposal to pay Rs. 1,25,000 was no doubt part of a composite arrangement, but none the less, as we have stated, that payment in form and in substance was only to secure the termination of a recurring liability, an annual payment of the managing agent's remuneration, plus 25 per cent of the net profits for eight years certain, and for an indefinite period thereafter. Another proposal was that Smith should serve as Managing Director up to the end of March, 1949, on a monthly salary of Rs. 3,000. He would have had the same amount as Smith, Ltd., if the managing agency were not terminated with retrospective effect from 1st April, 1948. No doubt Smith actually continued an Managing Director for a year more, up to March, 1950, but that was not, and could not have been, contemplated in August, 1948.

Yet another item of the arrangement was that when Smith quitted India after ceasing to be the Managing Director he should be employed by the assessee company as a Director in charge of the London Office and its buying organisation on an annual salary of £1.200. The Tribunal appears to have misconstrued the scope of the expression "retire". Smith did not intend to retire altogether from the business of the assessee company. He was to continue in the service of the company, but at London and not in India. That this arrangement benefited him did not alter the fact, that from the point of view of the assessee company it was an arrangement to its considerable advantage.

Ultimately the shareholders decided to grant a pension to Mrs. Smith after the lifetime of Mr. Smith, but that too can be left out of further account in deciding what the payment of Rs. 1,25,000 was intended to achieve.

Mr. Rama Rao Saheb submitted that, though Annexure B-2 the notice to the shareholders, made no reference to that opinion, Annexure B, which had been

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1. (1955) 1 S.C.R. 972 : 27 I.T.R. 34 and 35.

addressed to Smith, made it clear that what the Directors had in view was the re-constitution of the Company as a public company. We have already pointed out that the material on record did not disclose any intention at that stage of increasing the share capital. Annexure B only referred to the shares being made available for sale to the public in the near future. We are unable to accept the further contention of the learned counsel, that the expenditure was incurred only to facilitate the proposed conversion of the company from a private to a public company. Even if that was one of the objects in view, that did not in any way effect the profit-earning structure of the assessee company nor could a mere conversion itself be viewed in the circumstances of this case as an acquisition of a capital asset. It should be remembered that even before the commencement of the negotiations with Smith for the termination of the managing agency Cormac and Wood had been appointed as Managing Directors, obviously to continue the business built up by Smith.

We come back to the position, that the payment of Rs. 1,25,000 was to secure the termination of the managing agency and its attendant recurring annual liability to the company. It was not intended to bring in any capital asset, nor did it result in the acquisition of any capital asset. It was not an item of capital expenditure which section 10 (2) (*xv*) of the Act excludes.

The case-law on the subject of what amounts to a capital expenditure or revenue expenditure had been reviewed so often, that we do not consider it necessary to embark on a similar exhaustive investigation at this stage.

In *Nevill & Co. Ltd.* v. *Federal Commission of Taxation*[1], Latham, C.J., observed at page 301 :

" It is urged, however, that in so far as the expenditure was directed towards reducing current and future expenses. . . . . it did not increase assessable income. The mere reduction of expenditure though it decreases the expenditure side of an account, does not increase the receipts side of the same account. In my opinion the answer to this contention is to be found in a recognition of the fact that it is necessary, for income-tax purposes, to look at a business as a whole set of operations directed towards producing income. No expenditure, strictly and narrowly considered, in itself actually gains or produces income. It is an outgoing, not an incoming. Its character can be determined only in relation to the object which the person making the expenditure has in view. If the actual object is the conduct of the business on a profitable basis with that due regard to economy which is essential in any well conducted business, then the expenditure (if not a capital expenditure) is an expenditure incurred in gaining or producing the assessable income. If it is not a capital expenditure it should be deducted in ascertaining the taxable income of the tax-payer."

In *B. W. Noble Ltd.* v. *Mitchell*[2], a sum of £19,200 was paid to a retiring director. The Company claimed that as a deduction from its profits for income-tax purposes. In upholding that claim Lord Hansworth, M.R., observed at pages 420-421 :

" It is a payment made in the course of business, dealing with a particular difficulty which arose in the course of the year, and was made not in order to secure an actual asset to the Company but to enable them to continue, as they had in the past, to carry on the same type and high quality of business unfettered and unimperilled by the presence of one who, if the public had known about it, might have caused difficulty to their business and whom it was necessary to deal with and settle with at once."

Lawrence, L.J., said :

" I agree that the sum in question was wholly and exclusively expended by the Company for the purpose of its business, in the sense that the sole object with which the Company made the payment was to enable the Company to continue to carry on and earn profits in its business."

In that case it was an unwanted director, whose connections with the business had to be terminated in the interests of the business of that Company. That in the present case Smith's services, both his past services and his service expected for the future, were valued highly should make no real difference in the principle to apply. To adapt the words of the learned Master of the Rolls it was a payment made in the course of business, dealing with a particular situation which arose in the course of the year, and was made not in order to secure a capital asset to the company but to enable them to continue as they had in the past, carry on the same type

1. (1937) 56 C.L.R. 290. 2. (1926-27) 11 T.C . 372.

and high quality of business, unfettered by the obligation under the managing agency agreement to pay remuneration at a high rate (Rs. 3,000 a month plus 25 per cent. of the net profits) to the managing agents.

Among the reported cases, the case which comes nearest to the assessee's which we have to consider, is *Anglo-Persian Oil Co. Ltd* v. *Dale*[1], the headnote of which runs:

" By agreements made in 1910 and 1914 the appellant company (the assessee) appointed another limited company as its agents in Persia and the East, for a period of years, upon terms (*inter alia*) that the agents should be remunerated by commission at specified rates.

With the passage of time the amounts payable to the agents by way of commission increased far beyond the amounts originally contemplated by the Company, and, after negotiation between the parties, the agreements were cancelled in 1922, the agent company agreeing to go into voluntary liquidation and the company agreeing to pay the agents £3,00,000 in cash. This sum was in fact paid and the Company. . . . . that it was an admissible deduction incomputing the company's profits . . . . . ."

That claim was upheld by Rowlatt, J., and his decision was confirmed on appeal. Lord Hanworth, M. R., said this, at page 268 :

" The Company had appointed Messrs. Strick, Scott and Co., as their agents. They have now withdrawn that agency and are doing the business themselves. It seems difficult to accept the view that the appointment of an agent, or the withdrawal of an agency, in the very business belonging to the principals, creates or destroys a business of a separate nature or an asset which is to be added to the capital account. . . . where, as in this case, the expenditure is to bring back into the hands of the Company a necessary ingredient of their existing business—important, but still ancillary and necessary to the business which they carry on the expenditure ought to be debited to the circulating capital rather than to the fixed capital, which is employed in and sunk in the permanent—even if wasting assets of the business."

Lawrence, L.J., said at page 271 :

" . . . . . in the present case the expenditure brought no . . . . permanent advantage into existence as the Company might, at any time, revert to its former method of conducting its business, and place the management of its business in Persia again in the hands of an agent. The change in the method of carrying on the Company's business in Persia has, in fact, resulted in a more economical and efficient working of the Company's trade, and in that sense has proved to be advantageous to the Company's business, but it cannot be said that the expenditure in bringing about such a change has created an advantage for the enduring benefit of the Company's trade."

In *Scammell & Nephew, Ltd.* v. *Rowles*[2], Sir Wilfrid Greene, M.R., observed at pages 497 to 498 :

" . . . . . we find this Company finding itself in a situation of trading relationship with another company, which it wishes to get rid of because it is inconvenient to it. . . . . The termination of a trading relationship in order to avoid losses occurring in the future through that relationship, whether pecuniary losses or commercial inconveniences, is just as much for the purposes of the trade as the making or the carrying into effect of a trading. agreement."

The learned Master of the Rolls continued, at page 499 :

" In the present case, if the trading relation was one that was disadvantageous to the Company and, in order to get rid of it, the Company had to enter into an agreement. . . . and if in order to secure that that agreement should be effective, it was necessary to make a payment. . . . it seems to me a payment that was made for and was directly connected with the procuring by the Company of the advantage of terminating that trading relation and as such was wholly and exclusively laid out for the purposes of the Company's trade."

Having reached the conclusion, that the payment in question constituted an item of revenue expenditure and not a capital expenditure, the next question is whether the other requirements of section 10 (2) (*xv*) have been satisfied, that is, whether the expenditure was incurred wholly and exclusively for the business of the assessee. The view-point is that of business expediency, what a normally prudent businessman could be expected to do in good faith. It should be remembered that the good faith of none of the parties to the transaction was ever in doubt. All of them acted in the best interests of the Company. The shareholders approved of the proposals made by the Directors. Judged by the test of business expediency, it seems clear to us that the amount was expended wholly and exclusively for the business

1. (1931) 16 T.C. 253. 2. (1938-39) 22 T.C. 479.

of the assessee company. What we have stated earlier should suffice to answer this question also in favour of the assessee.

In paragraph 30 of its further statement of the case the Tribunal recorded :

" . . . . it is not unreasonable to infer that the directors in making the proposals for termination were fully conscious of Smith's independent intention to retire from India whether with or without compensation."

What the Tribunal appears to have overlooked is that there was no indication that on quitting India Smith intended to throw away the valuable rights he could claim under the managing agency agreement. He could assign those rights ; he could appoint some one to carry on the managing agency on behalf of Smith Ltd. Quitting India did not mean quitting business. We are unable to find on what basis the Tribunal came to the conclusion, that Smith contemplated complete retirement from business and without compensation. That Smith benefited by the transaction is not proof that the sole object of the Company was that he should benefit. An employee obviously benefits by the salary that is paid to him for his services. But the expenditure cannot be disallowed on that ground. We have found that the arrangement which involved the payment of Rs. 1,25,000 was entered into to enable the assessee Company to continue its business freed of the managing agency, freed of the liability to pay the managing agents a monthly remuneration and 25 per cent., of the net profits every year. The quantum of payment was wholly reasonable from a business-man's point of view. It is represented what the Directors then thought was but three years' commission but actually it cost them less. In our opinion the only conclusion possible on the material on record is that this amount of Rs. 1,25,000 was expended by the assessee company in the relevant year of account wholly and exclusively for its business. The requirements of section 10 (2) (*xv*) of the Act were satisfied.

Our answer to the question is that the payment is deductible under the provisions of section 10 (2) (*xv*) of the Act. The assessee will be entitled to the costs of this reference. Counsel's fee Rs. 250.

V.S. — *Reference answered in favour of the assessee.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE BALAKRISHNA AYYAR.

Nathella Sampathu Chetty, Proprietor of Nathella Sampathu Chetty and Son and another .. *Petitioners**

v.

The Collector of Customs, Madras .. *Respondent.*

Sea Customs Act (VIII of 1878), section 178-A (1)—Seizure of gold in the reasonable belief that it was smuggled gold—Burden of proof on the person found to be in possession of the gold to rebut the presumption—Provision is unconstitutional and void as offending fundamental rights provided by Article 19 (1) (f) and 19 (1) (g) of the Constitution—Foreign Exchange Regulation Act (VII of 1947), section 23-A—Order of confiscation of the gold without an option of a fine—Finding based upon the presumption under section 178-A (1) of the Sea Customs Act—Order illegal—Section 167 (8) of the Sea Customs Act—Order of confiscation—Quasi-judicial order open to correction by a writ of certiorari *under Article 226 of the Constitution.*

Section 178-A (1) of the Sea Customs Act constitute an unconstitutional infringement of the fundamental right secured by Article 19 (1) (*f*) and 19 (1) (*g*) of the Constitution and is therefore void under Article 13 of the Constitution and is unenforceable.

The reasonableness of a legislative provision casting the initial and rebuttable burden of proof on the person charged with the offence will have to be tested with reference to the needs of the situation and the relation of the rule of burden of proof to the context. What has to be proved under section 178-A (1) of the Act is that factually the gold was seized in the reasonable belief that it was smuggled gold. From that the presumption is that it is smuggled gold unless the person from whom the gold was seized could prove that it was not sumuggled gold. It is not enough if there is connection between

* Writ Petitions Nos. 384 of 1957 and 660 of 1958. 11th September, 1958.

the fact to be proved and the presumption that follows. It must be a rational connection or a reasonable relation.

There is no reasonable or rational connection between the fact to be proved and the presumption to follow under section 178-A (1). The very severity of the burden imposed by the Legislature on the person in possession of gold—in many cases will be a burden impossible of discharge—defeats the achievement of the purpose the Legislature had in view.

On the basis that it is not void and unconstitutional section 178-A (1) cannot apply unless it is established that the gold was seized in the reasonable belief that it was smuggled gold. The reasonable belief must be that of the person who effected seizure. It is belief and reasonable belief that the section requires and not mere suspicion. The reasonable belief, must precede or at least coincide with the seizure ; formation of the belief, subsequent to the seizure, however well-founded that belief is, will not satisfy the requirement of the section. It was held in the instant case that the requirement of the section were not complied with and therefore the order was liable to be set aside.

Section 23-A was embodied in the Foreign Exchange Regulation Act by the amending Act VIII of 1952 before section 178-A was incorporated in the Sea Customs Act. The notification in force now under which the import of gold was prohibited except on the permission granted by the Reserve Bank was issued under section 8 (1) of the Foreign Exchange Regulation Act in August, 1948. Under section 23-A of the Foreign Exchange Regulation Act that notification is deemed to be a notification issued under section 19 of the Sea Customs Act and therefore contravention of that notification becomes punishable under section 167 (8) of the Sea Customs Act. The penalty of confiscation imposed under section 167 (8) would be subject to section 183, under which the option has to be given to the owner of the goods ordered to be confiscated such fine as the officer thinks fit to specify under section 23-A of the Foreign Exchange Regulation Act that obligation disappears and it is left to the discretion of the officer ordering consfication whether or not to give the option for which section 183 of the Sea Customs Act provided. The order of confiscation which was actually passed on the finding that the burden of proof cast by section 178-A of the Sea Customs Act had not been discharged was therefore illegal since that section was not in the Sea Customs Act when section 23-A of the Foreign Exchange Regulation Act was enacted.

The decision availed at by the appropriate Customs Officer in proceedings to impose the penalties prescribed for instance, by section 167 (8) of the Sea Customs Act is quasi-judicial in its scope and as such is liable to correction by issue of a writ of *certiorari*.

Case-law discussed.

Amichand Vallamji v. *M.A. Abrol*, (Mis. App. No. 21 of 1957, High Court, Bombay, Original Side) unreported, referred.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the Order of the Collector of Customs, Madras, in No. S. 363-7 of 1957, dated 11th March, 1957 and quash the same and direct the Respondent to return the gold confiscated by the Respondent under his order, dated 11th March, 1957.

S. R. Vakil for *K. K. Jacob* and *S. K. L. Rattan*, for Petitioners.

The Advocate-General (*V. K. Tiruvenkatachari*) and Government Pleader (*B. V. Viswanatha Ayyar*), for Respondent.

The Order of the Court was made by

Rajagopalan, J.—The first petitioner is the proprietor of a firm which carries on business at Madras in gold, bullion and jewellery. The second petitioner is an employee of the firm. On 26th June, 1956, when the second petitioner alighted from the Bombay Mail at the Central Station at Madras, he was in possession of four blocks of moosa gold weighing about 1,000 tolas valued at over, one lakh of rupees. The claim of the petitioner all along was that the first petitioner was the owner of that gold as it was with the money found by the first petitioner that the gold was purchased at Bombay by the second petitioner for and on behalf of the first petitioner.

The following narrative of what happened after the second petitioner got off the train at the Central Station on 26th June, 1956, is taken from the order of the Collector of Customs, dated 11th March, 1957 :

"On 26th June, 1956, at about 6 A.M., Sri G. Nandagopal (second petitioner) who alighted at the Central Railway Station from the Bombay Express(?) train was intercepted by a Head Constable attached to the Prohibition Intelligence Bureau, Madras. Shri Nandagopal admitted that he was in possession of gold, which he was bringing for his firm from Bombay. Immediately the Customs Officers, who were on duty at the Central Railway Station contacted the Head Constable and questioned Shri Nandagopal. Shri Nandagopal admitted that he had on his person about 1,000 tolas

of " moosa " gold and accordingly four blocks of gold without marks were recovered from Shri Nandagopal's possession. Shri Nandagopal was not in possession of any bill of purchase, receipt or weighment slip for the said gold. The gold blocks were seized by the Police and passed on to Customs Officers under a mahazar."

The further facts were set out in paragraph 3 of the counter-affidavit filed by the respondent, the Collector of Customs :

" In a statement recorded immediately after the seizure before an independent witness, he (the 2nd Petitioner) stated that he proceeded to Bombay on 22nd June, 1956, on instructions of his principals the first petitioner herein, with Rs. 1,00,000 that he purchased the said gold on 24th June, 1956, from Messrs. Mathuradas Gopalakrishnayya and Co., Jahvari Bazaar, Bombay and brought the gold with him. A letter, dated 22nd June, 1956, by Tulasi Shah of the first petitioner's firm to Mathuradas Gopalakrishnayya and Co., Bombay, requesting them to receive and credit in their favour the sum of Rs. 1,00,000 sent in cash, was also recovered from the second petitioner. The second petitioner could not, however, account as to how he retained the letter with him. The Manager of the first petitioner's firm who was immediately contacted, admitted in writing that he had sent the second petitioner to Bombay to purchase gold. The first petitioner in his statement, dated 26th June, 1956, also affirmed that the second petitioner was sent with instructions to purchase " Mysore Petla " gold from Mathuradas Gopalakrishnayya and Co., Bombay, and that he believed that the second petitioner had purchased the gold from that firm. The first petitioner by the same statement undertook to produce the relative bill and touch report on their receipt. On 5th July, 1956, the petitioner forwarded to the respondent a bill, dated 24th June, 1956, issued by Mathuradass Shewakram of Messrs. Damodardas Homandass, No. 32-34, C.P. Tank Road, Bombay, for a sum of Rs. 1,01,171-6-0 for the sale of four blocks of gold weighing 1,000.7 tolas to the first petitioner's firm and also a statement from the said Shewakram affirming the transaction. The petitioner in his covering letter stated that the gold had been purchased by the second petitioner from Shewakram through a broker by name Odhavadas Gokuldas. No test report was, however, sent to the respondent. On 10th July, 1956, when the second petitioner was interrogated by the Assistant Collector of Customs (Preventive) in the presence of his counsel, he retracted from his earlier statement recorded in the presence of an independent witness on 26th June, 1956 and stated that the gold was purchased by him from Shewakram through his firm's broker. He admitted that no receipt was given by Shewakram on 24th June, 1956 and that he made the statement on 26th June, 1956, because he was afraid of his master, the first petitioner, who had asked him to buy gold from Mathuradas Gopalakrishnayya and Company."

After further enquiries by the Customs Department the Assistant Collector issued a notice to the second petitioner on 15th January, 1957. That notice summarised what had happened up to that date. Paragraph 10 of that notice set out :

" The explanations so far offered by, or on behalf of, Shri Nandagopal do not discharge the burden of proof imposed upon Shri Nandagopal by section 178-A of the Sea Customs Act. It is therefore, necessary to call upon him to show cause why the gold should not be confiscated under section 167 (8) of the Sea Customs Act read with section 23-A of the Foreign Exchange Regulation Act, 1947, as gold brought into India in contravention of the prohibition imposed by section 8 (1) of the Foreign Exchange Regulation Act read with section 19 of the Sea Customs Act."

The second petitioner submitted on 30th January, 1957, what has been termed by the Collector an " elaborate reply " to the notice issued on 15th January, 1957. The Collector of Customs also accorded a personal hearing when the second petitioner was represented by a counsel. One of the main questions debated during that enquiry was whether the second petitioner had discharged the burden of proving that the gold in question was not smuggled gold, that is, whether the requirements of section 178-A of the Sea Customs Act were satisfied by the second petitioner.

In paragraph 10 of his order, dated 11th March, 1957, the Collector recorded :

" That the gold which was being transported from Bombay to Madras on 26th June, 1956, was discovered in circumstances which raised a strong suspicion that it was smuggled gold has been established beyond all doubt. . . . . Bur the utter lack of any original record made before the gold was seized, coupled with the fact that not even the broad outlines could be revealed until after Sri Thulasi Sah returned from Bombay, make it quite impossible for me to hold that, by presenting this story, Shri Nandagopal has satisfactorily discharged the onus of proof that the gold is not smuggled gold. . . . . In fact Shri Nandagopal's efforts to discharge the burden of proof merely serve very strongly to confirm the original belief of the Customs Officers who seized the gold that it was smuggled gold."

The operative portion set out in paragraph 12 of the order of the Collector ran :

"I unhestitatingly hold that Shri Nandagopal has failed to discharge the burden of proving that the gold seized from him at the Madras Central Railway Station on 26th June, 1956, is not smuggled

gold. It follows that I must hold the gold to be gold imported into India in contravention of section 19 of the Sea Customs Act read with the Notification, No. 12 (11) F1/48, dated 25th August, 1945 (as amended) issued by the Central Government under section 8 (1) of the Foreign Exchange Regulation Act and section 21 (*ibid.*) and therefore to be gold liable to confiscation. I confiscate the gold under section 167, clause 8 of the Customs Act and I do not give Shri Nandagopal any option to pay a fine in lieu of confiscation."

The petitioners applied under Article 226 of the Constitution for the issue of a writ of *certiorari* to set aside the order of the Collector, dated 11th March, 1957, W.P. No. 384 of 1957. In the course of his arguments the learned counsel for the petitioners represented that the petitioners would apply for further relief, which he could do only by a separate petition is in compliance with the requirements of the practice of this Court. The petitioners thereupon preferred W.P. No. 660 of 1958 which was also under Article 226 of the Constitution, and obtained a rule *nisi*. The further relief asked for in W.P. No. 660 of 1958 was the

"issue of a writ of *mandamus* or any other order, writ or direction calling for the records relating to the order of the Collector of Customs in No. S. 363-7/57, dated 11th March, 1957, and direct the respondent to return to the petitioners the gold confiscated by the respondent under his order, dated 11th March, 1957".

It was agreed by counsel on both sides that both the petitions could be disposed of together.

The learned counsel for the petitioners attacked the validity of the order of the Collector, dated 11th March, 1957, on the following grounds: (1) Section 178-A of the Sea Customs Act was void under Article 13 of the Constitution as it was inconsistent with the fundamental rights of the petitioners guaranteed by Article 19 (1) (*f*) and 19 (1) (*g*) of the Constitution, and the statutory provisions were therefore unenforceable against the petitioners. (2) Even if section 178-A of the Sea Customs Act was valid and enforceable, the requirements of that section were not satisfied in this case. The statutory burden could have been cast on the second petitioner only if the gold had been seized in the reasonable belief that it was smuggled gold. There was no evidence and there was no finding, that at the point of seizure of the gold from the second petitioner on 26th June, 1956, the Customs Authorities who effected the seizure had reasonable belief that it was smuggled gold. (3) The Order of confiscation without the option of a fine, which option was obligatory under section 183 of the Sea Customs Act was under the enabling provision of section 23-A of the Foreign Exchange Regulation Act (Act VII of 1947). Section 178-A of the Sea Customs Act would not apply in determining whether the provisions of the Foreign Exchange Regulation Act applied. The order of confiscation which was virtually passed on the finding that the burden of proof cast on the second petitioner by section 178-A of the Sea Customs Act had not been discharged by him, was therefore illegal.

We shall proceed to deal with each of these contentions.

Section 178-A of the Sea Customs Act, the validity of which has been impugned runs:

"(1) Where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be on the person from whose possession the goods were seized.

(2) This section shall apply to gold, gold manufactures, diamonds and other precious stones, cigarettes and cosmetics and any other goods which the Central Government may, by notification in the Official Gazette, specify in this behalf."

(Sub-section (3) is omitted as it is not relevant for our purpose).

Section 178-A was enacted by the Amending Act XXI of 1955.

In the as yet unreported decision in *Amichand Vallamji* v. *M. G. Abrol*[1], a copy of which was made available to us, K.T. Desai, J., held that section 178-A of the Sea Customs Act was inconsistent with fundamental rights guaranteed to a citizen by Article 19 (1) (*f*) and 19 (1) (*g*) of the Constitution and was therefore void. Naturally

1. Mis. Appl. No. 21 of 1957 (High Court of Bombay Original Side.)

the learned counsel for the petitioners relied to a considerable extent on that decision in support of his challenge to the validity of section 178-A of the Sea Customs Act.

The validity of section 178-A was no doubt considered by the Supreme Court in *Babulal Amirth Mehta* v. *Collector of Customs*[1]. The challenge then was based only on Article 14 of the Constitution and the Supreme Court held that the impugned section could not be struck down on the infirmity either of discrimination or illegal classification, and that it did not offend against Article 14 of the Constitution. At page 830, however, Govinda Menon, J., said :

> "Though Mr. Chatterjee faintly argued that the provisions of Article 19 (1) (*f*) and (*g*) and Article 31 of the Constitution had been violated, he did not seriously press those contentions. The main point of the attack was centered on the centention that section 178-A was violative of equal protection of the laws guaranteed under Article 14 of the Constitution."

That decision therefore does not bar an investigation of the question, whether section 178-A of the Sea Customs Act is void under Article 13 of the Constitution on any other ground, for example, that if offends against Article 19 (1) (*f*) and or (*g*) and is not saved by clause (5) or clause (6) of Article 19. On this point we are in respectful agreement with Desai, J.

Even at the outset we must make it clear that we shall consider the validity or invalidity of section 178-A (1) of the Sea Customs Act only in relation to gold among the article enumerated in clause (2) of that section. Possibly, other considerations might arise, if the question has to be considered with reference to any of the other commodities specified in clause (2) or which can be brought within the scope of that clause by the notification for which that clause provides. Confining the question to gold, section 178-A (1) would in effect read as follows :

> " Where gold is seized under this Act in the reasonable belief that it is smuggled gold, the burden of proving that it is not smuggled gold shall be on the person from whose possession the gold was seized."

In the absence of any statutory definition of the expression "smuggled" it will have to be given its normal dictionary meaning, which, in relation to goods, is "imported or exported illegally". Evasion of payment of customs duties prescribed by appropriate legislation is but one type of illegality. Such evasion could be either by bringing the goods into the country otherwise than through the customs barrier on payment of customs duty or by getting the goods through the customs barrier otherwise than on a true declaration of the nature of the goods. Independent of any question of the legal liability to pay the customs duties were the import of goods is absolutely prohibited by law, and such goods are brought into the country, they would also be smuggled goods, that is, goods imported illegally. The same considerations would apply where the import is not absolutely prohibited but is regulated for example, by the grant of permission under section 8 (1) of the Foreign Exchange Regulation Act (Act VII of 1947). We have only given illustrative examples of what would constitute smuggled goods.

The stock of gold held by our countrymen have been the subject of comment over twenty centuries. It may not be necessary to furnish statistical details, though some of them were mentioned during the arguments before us, based mainly on the reports of the Reserve Bank of India. Part of the gold now in India was of indigenous origin, but most of it came from other countries. Gold poured into this country for centuries before any one thought of customs duties or exchange regulations. In the ultimate shape the gold might constitute for example, jewellery and even blocks or bars of gold cast into convenient sizes for sale, it is really impossible to say from its look whether it was indigenous gold or gold which was imported. Certainly it is impossible to say by a look at the gold when it was imported, and, whether after the imposition of restrictions, it was imported on payment of the customs duty or on

1. (1957) S.C.J. 828.

the grant of a licence. Gold has all along been an article of unrestricted trade in the open market in India. Import of gold was not restricted or regulated until comparatively recently. It was only in 1939 that the licence was prescribed for the import of gold by a notification issued under the Sea Customs Act. Customs duties on import of gold came into force only after 1946. The import of gold is now regulated by the Foreign Exchange Regulation Act. The permission of the Reserve Bank is necessary under section 8 (1) of that Act. Even so, as the learned counsel for the petitioners pointed out, no one who wants to buy gold in the open market would think of asking for its "pedigree", to verify when and where that gold first came into existence or even when it first became available in India as an article of merchandise. That was the position when section 178-A of the Sea Customs Act was enacted by Act XXI of 1955.

The burden cast by section 178-A on a person in India unfortunate or otherwise, but in possession of gold, can well be set out in the lanuage of the Supreme Court in *Babulal Amirthlal Mehta* v. *Collector of Customs*[1]. The relevant passage is at page 833 :

> " No doubt the content and import of the section are very wide. It applies not only to the actual smuggler from whose possession the goods are seized but also to those who came into possession of the goods after having purchased the same after the same has passed through many hands or agencies. For example, if the Customs Authorities have a reasonable belief that certain goods in the possession of an innocent party are smuggled goods and the same is seized under the provisions of this Act, then the person from whose possession the goods were seized, however innocent he may be, has to prove that the goods are not smuggled articles. This is no doubt a very heavy and onerous duty cast on an innocent possession who, for aught one knows, may have *bona fide* paid adequate consideration for the purchase of the articles without knowing that the same has been smuggled. The only pre-requisite for the application of the section is the subjectivity of the Customs Officer in having a reasonable belief that the goods are smuggled."

This was reiterated in a later passage at pages 833-834 :

> " As stated already, it is a heavy burden to be laid upon the shoulders of an innocent purchaser who might have come into possession after the article has changed many hands. . . . ."

Does the imposition of that statutory burden offend against the fundamental right guaranteed to the petitioners as citizens of India by Article 19 (1) (*f*) and/or 19 (1) (*g*) and can that burden be viewed as a reasonable restriction on the exercise of these rights within the limits prescribed by clauses (5) and (6) of Article 19 of the Constitution are the questions we have to determine.

In relation to gold it should be obvious that the petitioners could claim the benefit of both Article 19 (1) (*f*) and 19 (1) (*g*). Gold is property which the first petitioner could acquire, hold and dispose of in the exercise of the right guaranteed by Article 19 (1) (*f*). The first petitioner could also claim the right guaranteed by Article 19 (1) (*g*) to carry on trade or business in gold. It is his business and the second petitioner is an employee of his in that business. If any portion of the gold which the first petitioner held as owner and dealer, either directly or through his employee, the second petitioner, was seized by the Customs Authorities—we shall presently deal with the question under what circumstances it could be seized—section 178-A imposes on the person from whom the gold was seized factually it was seized from the second petitioner in this case—the burden of proving that the seized gold was not smuggled gold. Obviously it is a restriction on the right to acquire, hold and dispose of gold as property and on the right to carry on buiness in gold, both of which the first petitioner could claim. So the real question for determination is, whether it is a restriction within the limits set by Article 19 (5) and Article 19 (6) of the Constitution. Is it a reasonable restriction, and has that reasonable restriction been imposed in the interests of the general public. Both the requirements have to be satisfied before the validity of section 178-A (1) of the Sea Customs Act can be upheld.

The contention of the learned Advocate-General, who appeared for the respondent, was that the restriction was imposed in the interests of the general public. That contention, in our opinion, is well founded. The validity of the laws imposing

1. (1957) S.C.J. 828.

restrictions on the import of gold was never in issue in these proceedings. Gold can be imported only after obtaining permission from the Reserve Bank of Inda under section 8 (1) of the Foreign Exchange Regulation Act, and even then only after payment of the Customs duty. It was represented that in the present economic position of the country the import of gold is virtually banned, because the Reserve Bank has seldom seen any justification for the grant of permission to import gold. Effectuation of these laws itself is in the interest of the general public. Any statutory provision to arm the authorities with the necessary powers to enforce the laws regulating import of gold and to prevent the evasion of these laws is legislation conceived in the interests of the general public. In *Guruviah Naidu* v. *State of Madras*,[1] a Division Bench of this Court, of which one of us was a member, observed at page 479:

> "A statute might therefore itself be the foundation for the creation and emergence of a public interest to preserve its principles and to secure that it is not evaded. To the extent that that law or other law enables this purpose to be achieved, its enforcement must be held to be in the public interest."

We do not consider it necessary to refer again to the English decisions considered in *Guruviah Naidu* v. *State of Madras*[1]. That leaves us with the question whether it was a reasonable restriction that section 178-A (1) of the Sea Customs Act imposed.

In examining the reasonableness or otherwise of a statutory restriction imposed on the exercise of the fundamental rights guaranteed by Article 19 (1), we have to see among other things what need it was that the statutory provision was intended to serve. For that it is permissible to look into the Statement of Objects and Reasons furnished by the Legislature itself. In explaining the need for clause 14 of the Bill, under which section 178-A was eventually incorporated into the Sea Customs Act by Act XXI of 1955 the Statement of Objects and Reasons set out :

> "At present when action is taken aginst persons who are in possession of smuggled gold it is not always easy for the Customs Authorities to prove that the goods are smuggled goods. This clause places the burden of proof in such cases on persons from whose possession the suspected smuggled goods are seized. Such a provision is necessary in order to safeguard the revenues of the State."

Two factors at least emerge. There was need to supplement the existing statutory provisions to prevent smuggling of gold among other commodities to safeguard the revenues of the Sate. We can add, there was need to prevent smuggling of gold in contravention of the Foreign Exchange Regulation Act. The other factor was "it is not always easy for the Customs Authorities to prove the goods are smuggled goods" Paraphrased, this may well mean in some cases at least "We have to determine when the gold we have seized first arrived in India, to verify whether or not it was smuggled. It may not even be enough to prove the history of gold up to 1939 when restrictions were first imposed on the import of gold. Despite our resources, despite the facilities for investigation which the Police and Customs Officers have, we are unwilling or unable to undertake that investigation. In many cases we find it impossible to secure evidence which will prove that the seized gold was smuggled into the country. So, you, the person from whose posession the gold was seized must prove among other things the origin of the gold, to establish that the gold was not smuggled into the country. You may, from the facts within your personal knowledge, prove that you bought the gold *bona fide* in the open market. But that is not enough. You must establish by positive evidence when and under what circumstances this piece of gold came into this country." Put that way the unreasonableness of the demand is manifest : and yet that is a demand sanctioned by section 178-A (1) of the Sea Customs Act.

Of course it is not to every piece of gold found in the country to which section 178-A (1) will apply. The section limits it to gold that is seized under the provisions of the Sea Customs Act in the reasonable belief that it is smuggled gold. We shall deal later with the question at what point of time. that reasonable belief has to be formed. It may not be necessary now to examine the scope of sections 169, 171 and 172 of the Sea Customs Act which provide for seizure. Section 178, which is comprehensive in its scope, runs :

1. (1957) 2 M.L.J. 469.

"Anything liable to confiscation under the Act may be seized in any place, either upon land or water, by any officer of Customs or other person duly employed for the prevention of smuggling."

Smuggled gold is certainly liable to be confiscated under section 167 (8) of the Sea Customs Act. But before confiscation can be ordered it must be proved it was smuggled gold. Section 178-A (1) in effect directs that if gold is seized in the reasonable belief that it was smuggled, it is for the person from whom it was seized to prove that it was not smuggled. The learned counsel for the petitioners urged, with a real basis for that contention, that the apparent limitation might well be illusory in determining whether section 178-A (1) of the Sea Customs Act imposed a reasonable restriction on the fundamental rights of a citizen to acquire, own and dispose of gold and to trade in gold. The limitation imposed by section 178-A (1) is that the gold must have been seized in the reasonable belief that it was smuggled gold. As the Supreme Court pointed out in *Babulal Amithalal Mehta* v. *Collector of Customs.*[1]

"the only pre-requisite for the application of the section is the subjectivity of the Customs Officer in having a reasonable belief that the goods are smuggled."

The reasonableness of the belief is not subject to investigation by a Court by the application of any objective criteria. Whether the belief was in the circumstances of a given case reasonable or not is thus not a justiciable issue. The learned counsel for the petitioners pointed that, even in a departmental enquiry under the Sea Customs Act, it may not be open to the person called on to explain why the seized gold should not be confiscated to ask for evidence of the grounds on which the officer who seized the gold formed a reasonable belief that the gold in question was smuggled. All that such a person could ask of the enquiring officer at that stage is only a verification whether the gold was factually seized on such reasonable belief, and not a verification of the grounds for that belief. The requirement that factually the officer who effected the seizure should have acted on a reasonable belief apparently it should be enough if he said so, without any liability to disclose the grounds of his belief may be no safeguard at all, even though the view point of Courts would be, as it should be, that normally officers entrusted with statutory powers of seizure would act reasonably and in good faith, which postulates due care and......enquiry, and that the reasonable belief required by section 178-A (1) would be formed on rational grounds.

The learned counsel for the petitioners pointed out that under the rules a successful detection of smuggling results in pecuniary rewards upto half the value of the smuggled goods, and he submitted that what is at best a subjective satisfaction of the Officer who seized the goods may be tainted by the expectation of such reward. The reasonable expectation of the Court, which we have postulated above, should itself suffice to rule out further consideration of this plea. Besides every seizure, even on the basis of reasonable belief, need not necessarily result in an enquiry, in the course of which the person from whom the gold was seized would be called upon to bear the statutory burden imposed by section 178-A (1). Certainly, it is not every seizure that ultimately results in confiscation. The sequence of events would be, as the learned Advocate-General pointed out, seizure, delivery to the Customs Officer under section 179, a probable investigation at that stage for the Customs Officer, competent to order or to hold an enquiry, to decide whether there was *prima facie* evidence to show that an offence punishable under section 167 (*a*) of the Sea Customs Act has been committed, issue of notice to the person from whom gold was seized, and then an enquiry. It is only at the state of that enquiry that section 178-A (1) comes into play. The learned Advocate-General submitted that, though it may not be open to the person from whom gold was seized to plead or prove at that enquiry that the seizure itself was without reasonable cause and was therefore illegal, the normal expectation should be, that the Officer who issues notice to that person would satisfy himself before the issue of the notice that the seizure was lawful.

Even to those brought up to believe, almost as an article of faith, in the initial presumption of innocence in the case of a person charged with the commission of an offence punishable under the law, it should be obvious that for the legislature to cast

1. 1957 S.C.J. 828 : (1957) 1 M.L.J. (Crl.) 765 (S.C.).

the initial burden of proof on such a person is not *per se* a violation of the safeguards provided by our Constitution. If such a legislative provision affects or abridges any of the fundamental rights guaranteed for instance by article 19 (1) and constitutes a restriction on the exercise of those rights, courts will have to examine the reasonableness of the restriction. The reasonableness of the legislative provision casting the initial and rebuttable burden of proof on the person charged with the offence will have to be tested with reference to the needs of the situation and the relation of the rule of burden of proof to the context. As pointed out by Mahajan, J., in *Chintaman Rao* v. *State of Madhya Pradesh*[1] what should be established is a reasonable relation of the provision of the Act to the purpose in view. This is how Chagla, C.J., put it in *Bapubhai Ratanchand Shah* v. *The State of Bombay*[2] which was quoted by Desai, J., in his judgment in *Amichand Vellanji* v. *M.G. Abrol*[3]:

> " It is true that when a restriction is imposed upon the right of the citizen guaranteed to him under Article 19 it is for the State to justify that restriction. But whether a restriction is reasonable or not must be judged not in the abstract but in the context of the times and in the context of social needs and social urges."

The test postulated by the Supreme Court in *Chintaman Rao* v. *State of Madhya Pradesh*[1], is really not different from that laid down by the Supreme Court of America for examinig the validity of an impugned statutory provision for presumptions in law with reference to the 'due process' clause. In *Alenzo Bailey* v. *State of Alabama*[4], Hughes, J., quoted with approval the principle laid down in an earlier case by Lurton, J., at page 200 of the report :

> " That a legislative presumption of one fact from evidence of another may not constitute a denial of due proeess of law, or a denial of the equal protection of the law, it is only essential that *there shall be some rational connection between the fact proved and the ultimate* fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defence to the main fact thus presumed. If a legislative provision not unreasonable in itself, prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defence all the facts bearing upon the issue, there is no ground for holding that due process of law has been denied to him.'

The further note of warning sounded by Hughes, J., in the case was :

> " The power to create presumptions is not a means of escape from constitutional restriction."

These principles were reaffirmed by the Supreme Court of America in *Manley* v. *State of Georgia*[5] and *Tot* v. *United States*[6].

What has to be proved under section 178-A (1) of the Sea Customs Act—we are still confining ourseles only to gold—is that factually the gold was seized in the reasonable belief that it was smuggled gold. From that the presumption is that it is smuggled gold unless the person from whom the gold was seized could prove that it was not smuggled gold. It is not enough if there is connection between the fact to be proved and the presumption that follows : It must be a *rational connection* in the words of the learned Judges of the Supreme Court of America, or there must be a *reasonable relation,* which is the language of our Supreme Court. We have pointed that the reasonable belief that section 178-A (1) requires is at best the subjective satisfaction of the Officer who seized the gold. That is what the Supreme Court laid down in *Babulal Amithalal Mehta* v. *Collector of Customs*[7], which will bear repetition :

> "The only pre-requisite for the application of the section is the subjectivity of the Customs Officer in having reasonable belief that the goods are smuggled."

Mehta's Case[7], also stressed the heavy and onerous duty cast on the innocent purchaser of gold in what is still an open market in India for gold. These dicta of the Supreme Court in *Mehta's Case*[7] should themsleves suffice to hold that there is no reasonable or rational connection between the fact to be proved and the presumption to follow

1. (1950) S.C.J. 571 : 1950 S.C.R. 759.
2. (1955) 57 Bom.L.R. 892.
3. Mis. Appl. 21 of 1957 Bom. H. Court.
4. 55 L.Ed. 191.
5. 73 L.Ed. 575.
6. 87 L.Ed. 1519.
7. (1957) 1 M.L.J. (Cr.) 765 : 1957 S.C.J. 828 (S.C.).

under section 178-A (1). The very severity of the burden imposed by the Legislature on the person in possession of gold—in many cases it will be a burden impossible of discharge—defeats the achievement of the purpose the legislature had in view. The learned counsel for the petitioner pointed out that the enforcement of section 178-A (1) even *bona fide*, might well result in a virtual prohibition of trade in gold even in the open market, unless the seller can arm himself with the 'pedigree' of every bit of gold offered for sale.

If we understand the learned Advocate-General aright, he submitted that the apparent severity of the burden imposed by section 178-A (1) could be tempered, if the section were construed on the lines on which the analogous statutory provision in England, section 259 of the Customs Consolidation Act, 1876, was construed, by the Court of Criminal Appeal in *Rex* v. *Fitzpatrik*[1], and he relied on the passage at page 772 of the judgment of Goddard, C.J., which ran :

"The onus is put on the defendant when there is a dispute in the proceedings whether duty has been paid or whether the goods were lawfully imported. The obvious reason for this provision is that the facts must be within the knowledge, and often within the exclusive knowledge, of the defendant. If, for instance, it is found that he has dealt in prohibited goods, if he can show that he acquired them in the ordinary course of business obviously he would not be guilty of dealing in them with intent to avoid the prohibition. He can prove the positive and, unless he had to undertake the proof, the Crown would generally have to undertake the proof of a negative."

Apart from the fact that the language of section 178-A (1) of the Sea Customs Act is not in *pari materia* with that of section 259 of the Customs Consolidation Act of 1876, the scope of section 178-A (1) is really concluded by the observations of the Supreme Court in *Mehta's Case*[2], which we have already set out.

We find ourselves in respectful agreement with what Desai, J., said in the unreported decision[3] we have referred to above.

" The burden cast upon the citizen in most cases is virtually impossible of being discharged. One can understand a provision where the burden of showing that the gold in question had been purchased in good faith without notice that the same hasbeen smuggled or without reason to believe that the same is smuggled is imposed. But one cannot countenance a burden where he has to establish facts not within his knowledge and which for all practical purposes it might virtually be impossible for him to discharge.".

Earlier he observed :

"Under section 178-A of the Sea Customs Act there is no proof of any fact from which a reasonable inference can be drawn that the gold is smuggled. The burden sought to be cast is well-nigh an impossible burden. It subjects citizens to unfairness or hardship. From the subjective reasonable belief of a Customs Officer that the gold is smuggled an inference cannot reasonably be drawn that the gold has in fact been smuggled and that an offence in relation thereto has been committed. The object of the legislation in effect is to penalise a citizen for the difficulties experienced by Customs Officers in establishing that the gold seized had been smuggled. The inference sought to be drawn is arbitrary and results in the violation of the fundamental rights guaranteed under Article 19 (1) (*f*) and (*g*) of the Constitution ".

We uphold the first of the contentions of the learned counsel for the petitioners that section 178-A (1) of the Sea Customs Act constitutes an unconstitutional infringement of the fundamental right of the petitioners secured by Articles 19 (1) (*f*) and 19 (1) (*g*) and is threfore void under Article 13 of the Constitution, and is unenforceable against them.

We shall next deal with the second of the contentions of the learned counsel for the petitioners, which would arise for determination if the provisions of section 178-A (1) of the Sea Customs Act were not void under Article 13 of the Constitution.

The learned counsel for the petitioners submitted that before the burden of proof for which section 178-A (1) provides can be cast on the person from whom the gold was seized, it must be established that the gold was seized in the reasonable belief that it was smuggled gold, and that such reasonable belief on the part of the officer effecting the seizure must precede the seizure. The other two requirements of sec-

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1. (1948) 1 A.E.R. 769.
2. (1957) 1 M.L.J. (Crl.) 765 (S.C.) :1957 S.C.J. 828.
3. Misc. Appl. 21 of 1957 (Bombay).

tion 178-A (1) were satisfied in this case : (i) the gold was "goods" to which the section applied, and (ii) it was seized under the Act by Customs Officers. The learned counsel urged that the third requirement was not satisfied. There was no finding, and there was no evidence either to sustain such a finding, that the gold had been seized on 26th June, 1956, in the reasonable belief that it was smuggled gold.

The learned Advocate-General was, in our opinion, right when he pointed out that the word 'smuggled' in section 178-A (1) in relation to goods was descriptive, to mark off smuggled goods from other kinds of goods which could also be seized under section 178 among other sections of the Sea Customs Act. He realised that the seizure must be lawful and in good faith. We are unable however, to accept as sound his further contention, that the words "reasonable belief" also are only descriptive of the smuggled goods seized, and that the terms of the section did not prescribe the existence of a reasonable belief as a condition precedent to be satisfied before the burden of proof could be imposed on the person from whom the goods (gold) were seized . Such a result could be achieved only if we delete the words from section 178-A (1) "in the reasonable belief that they are smuggled goods." and read the section as "where any goods to which this section applies are seized under this Act, the burden of proving they are not smuggled goods shall be on the person from whose possession the goods were seized". Such a reading is not permissible to interpret the plain words of the section. Once again we have to point out that the Supreme Court has held in *Mehta's Case*[1], that the reasonable belief that the goods were smuggled, though it could only be subjective was a *pre-requisite* for the application of section 178-A (1).

We must uphold the contention of the learned counsel for the petitioners, that unless it is established that the gold was seized in the reasonable belief that it was smuggled gold, section 178-A (1) cannot apply. The reasonable belief must be that of the officer who effected the seizure. It is belief and reasonable belief that the section requires, and not for instance...mere suspicion, which is all that section 173 requires to justify arrest, or section 180 requires to justify seizure and detention of goods. The reasonable belief must precede or at least coincide with the seizure ; formation of the belief subsequent to the seizure, however well-founded that belief is, will not satisfy the requirements of section 178-A (1)

It should be remembered that the second petitioner was intercepted first by the Police Head Constable on duty on 26th June, 1956 on suspicion and then handed, over to the Customs authorities on duty at the railway station. It was the Customs Inspector (Special Division) that seized the gold. All that he recorded at the time of the seizure was :

> " Detained 4 (four) blocks of gold, said to weigh about 1,000 (one thousand tolas) only from Sri Nandagopal, representative of M/s. Nathella Sampath Chetty & Son of No. 177, N.S.C. Bose Road, Madras, for further investigation."

We must emphasise this feature. The seizure was stated to be for further investigation. There was no indication there that the Customs Inspector who seized the gold reasonably believed at that stage that the gold was smuggled gold. That was the document, which was apparently referred to as "Mahazar" in paragraph 1 of the notice subsequently issued to the second petitioner on 15th January, 1957 ; and the recitals in that notice do not take us beyond the record of seizure. What was set out in paragraph 1 of the notice was :

> " The gold blocks were seized by the Police and Customs Officers under a mahazar."

That and the earlier recitals in paragraph 1 of the notice were closely followed in setting out in paragraph 1 of the preamble of the order of the Collector dated 11th March, 1957, what happened at the time of the seizure on 26th June, 1956.

Again only the factum of seizure was recorded. without any reference to the existence of any reasonable belief to warrant that seizure.

Thus there was no material up to that stage to warrant any possible finding that factually the officer who effected the seizure on 26th June, 1956, did so in the

1. (1957) 1 M.L.J. (Crl.) 765 (S.C.) : 1957 S.C.J. 828.

reasonable belief that it was smuggled gold. In summarising the contentions of the second petitioner in the preamble part of the order, dated 11th March, 1957, the Collector set out in paragraph 8 (ii) that the second petitioner raised an issue, that

> "at no time he had been divulged the reasonable belief which led the Customs officers to seize the gold."

There was no discussion and no finding recorded by the Collector on that issue. What the Collector recorded was :

> "I observe that police officers acting in exercise of powers conferred upon them by Acts other than the Sea Customs Act discovered that Sri Nandagopal was carrying approximately 1,000 tolas of gold when he arrived at the Madras Central Railway Station from Bombay on 26th, June 1956. The Police officers informed certain Customs Officers, who were also at the Central Railway Station. The fact that Sri Nandagopal was not in possession of any documents regarding the purchase of this gold, coupled with knowledge of the extensive traffic in smuggled gold derived from confidential records, gave these officers strong reason to believe that the gold was smuggled."

That passage has to be read with the further explanation the Collector attempted in paragraph 9 of his order :

> "I must here emphasise that although I have read the confidential records referred to in the opening paragraph, I am in no way embarrassed by being in possession of secret information from any person claiming to know that the gold is smuggled gold. It was necessary for me to satisfy myself, at a very early stage of the case, that the Customs Officers who seized the gold had reasonable grounds to believe that it was smuggled gold. My decision that the seizure was justified was based solely on general considerations. The point at issue then was simply whether I should be justified in ordering the immediate release of the gold on the grounds that the circumstances were not sufficient to bring section 178-A of the Sea Customs Act into operation. My decision that the circumstances placed upon Sri Nandagopal the onus of proof that the gold was not smuggled gold did not in any way imply pre-judging the situation that exists now, after Sri Nandagopal has been given ample opportunity to discharge that onus."

In paragraph 10 of the order the Collector recorded :

> "That the gold which was being transported from Bombay to Madras on 26th June, 1956, was discovered in circumstances which raised a strong suspicion that it was smuggled gold has been established beyond all doubt."

We are unable to look upon these passages as embodying a finding, express or implied, that the officer who seized the gold did so in the reasonable belief that it was smuggled gold, the Collector, it should be remembered, recorded :

> "My decision that the seizure was justified was based solely upon general considerations."

What these general considerations were we are unable to gather nor is it necessary. It is not the Collector's satisfaction that is relevant. What is relevant is, what was the belief of the officer who seized the goods on 26th June, 1956, at the time of that seizure. The order of the Collector is really silent on that point.

The second of the contentions of the learned counsel for the petitioners has also to prevail. That by itself is sufficient to set aside the order of the Collector. The real basis for his finding, that it was smuggled gold, was that the second petitioner had not discharged the burden imposed on him by section 178-A (1). That burden, in the circumstances of this case should not have been cast on the second petitioner.

To dispose of the third of the contentions of the learned counsel for the petitioners which we have set out above, we have to consider the scope and effect of section 23-A of the Foreign Exchange Regulation Act, VII of 1947, which runs :

> "Without prejudice to the provisions of section 23 or any other provision contained in this Act, the restrictions imposed by sub-sections (1) and (2) of section 8. . . . . shall be deemed to have been imposed under section 19 of the Sea Customs Act, 1878 (VIII of 1878), and all the provisions of that Act shall have effect accordingly, except that section 183 thereof shall have effect as if for the word 'shall' therein the word 'may' were substituted."

Section 23-A was embodied in the Foreign Exchange Regulation Act by the Amending Act VIII of 1952, that is, before section 178-A was incorporated in the Sea Customs Act which was only in 1955.

The notification in force now, under which the import of gold was prohibited except on the permission granted by the Reserve Bank of India, was issued under

section 8 (1) of the Foreign Exchange Regulation Act in August, 1948. Under section 23-A of the Foreign Exchange Regulation Act, that notification is deemed to be a notification issued under section 19 of the Sea Customs Act, and therefore contravention of that notification becomes punishable under section 167 (8) of the Sea Customs Act. The penalty of confiscation imposed under section 167 (8) would be subject to section 183, under which the option has to be given to the owner of the goods ordered to be confiscated to pay in lieu of confiscation such fine as the officer thinks fit to specify. Under section 23-A of the Foreign Exchange Regulation Act that obligation disappears, and it is left to the discretion of the officer ordering confiscation whether or not to give the option for which section 183 of the Sea Customs Act provided. It was that statutory power to exercise discretion that the Collector exercised in this case, and he ordered confiscation without the option of a fine. The operative portion of his order ran :

" . . . . . I must hold the gold to be gold imported into India in contravention of section 19 of the Sea Customs Act (read with the Notification, No. 12 (11) P1/48, dated 25th August, 1948 (as amended) issued by the Central Government under section 8 (1) of the Foreign Exchange Regulation Act and section 23-A (*ibid*) and therefore gold liable to confiscation. I confiscate the gold under section 167, clause (8) of the Sea Customs Act and I do not give Sri Nandagopal any option to pay a fine in lieu of confiscation."

The contention of the learned counsel for the petitioner was, that to establish a contravention of the notification of 1948 issued under section 8 (1) of the Foreign Exchange Regulation Act, which was no doubt by the legal fiction enacted by section 23-A of that Act deemed to be a notification issued under section 19 of the Sea Customs Act, the Collector was entitled only to apply the provisions of the Sea Customs Act as its stood when section 23-A of the Foreign Exchange Regulation Act was enacted in 1952, and that he was not entitled to invoke the presumption permitted by section 178-A (1) of the Sea Customs Act, which was incorporated into the Sea Customs Act later in 1955. We have pointed out that it was virtually on the basis that the second petitioner had not discharged the burden of proof, which in the view of the Collector had been laid on the second petitioner by section 178-A (1), that the Collector came to the conclusion, that the gold seized from the scond petitioner was liable to confiscation under section 167 (8). Still, the contravention to be established was that of the notification issued under section 8 (1) of the Foreign Exchange Regulation Act.

The language of section 23-A of the Foreign Exchange Regulation Act bars, in our opinion, acceptance of the plea of the learned Advocate-General, that the provisions of section 8 (1) among others of that Act were incorporated into the Sea Customs Act. It was really the provisions of the Sea Customs Act as they stood in 1952 that were incorporated by reference to that Act into the Foreign Exchange Regulation Act by section 23-A thereof.

In *Secretary of State of India* v. *Hindustan Co-operative Insurance Society Ltd.*,[1]. The Privy Council laid down at page 64 :

" It seems to be no less logical to hold that where certain provisions from an existing Act have been incorporated into a subsequent Act, no addition to the former Act, which is not expressly made applicable to the subsequent Act, can be deemed to be incorporated in it, at all the events if it is possible for the subsequent Act to function effectually without the addition ".

The learned Advocate-General drew our attention also to the passage in the judgment of Rajagopala Ayyangar, J., in *Radhakrishna Chettiar* v. *State of Madras*[2], where the learned Judge referred to the principle laid down by the Privy Council.

We uphold also the third of the contentions of the learned Counsel for the petitioners. Once the contravention of the notification issued under section 8 (1) of the Foreign Exchange Regulation Act was established, section 23-A of that Act no doubt permitted the Collector to exercise his discretion to refuse the option of a fine in lieu of confiscation. To establish that contravention it was not open to the Collector to have recourse to the provisions of section 178-A (1) which was not one of the provi-

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1. (1931) 58 I.A. 259 : 61 M.L.J. 864 : I.L.R. 59 Cal. 55 (P.C.).
2. (1956) 2 M.L.J. 279 at 285.

sions of the Sea Customs Act within the scope of section 23-A of the Foreign Exchange Regulation Act.

It is true that this contention was not set out in the affidavits filed by the petitioners in these proceedings. We, however, permitted the counsel for the petitioners to advance the additional plea, as it raised only a question of law, which did not involve an investigation of any facts other than those already disclosed. We did not understand the learned Advocate-General to object to our adjudication of this question on the ground that it had not been disclosed in the petitioners' affidavits.

The acceptance of the third of the contentions also renders the order of the Collector liable to be set aside.

It was never the contention of the learned Advocate-General that if the invalidity of the impugned order of the Collector was established, it was not liable to be set aside by the issue of a writ of certiorari. We are indeed indebted to him for a clear exposition, with reference to decided cases, of the true scope of the proceedings under the Sea Customs Act in which the impugned order was passed by the Collector.

The learned Advocate-General pointed out that the restrictions imposed by the Sea Customs Act and the Foreign Exchange Regulation Act on the import of gold did not themselves constitute revenue or penal laws, despite the use of the words "offence" and "punishment" in section 167 (8) of the Sea Customs Act among others. In the decision of the House of Lords in *Regazzoni* v. *K. C. Sethia Ltd.*[1] Lord Reid said at page 293 :

" The Indian law which prohibited exports to South Africa does not appear to me to be a revenue or penal law any more than was the law of exchange control considered by this House in *Kahler* v. *Midland Bank Ltd.*[2]"

Penalties including confiscation imposed under section 167 (8) of the Sea Customs Act did not constitute them criminal proceedings. They are civil proceedings—See *Commissioners of Customs and Excise* v. *Sokolow's Trustee*[3], where Hillbery, J., had to consider the position under the corresponding provisions of theCustoms Laws Consolidation Act, 1876. The sanctions are civil in their nature, as in the analogous case under section 28 of the Income-Tax Act—See *Sivagaminatha Moopanar and sons* v. *Income-Tax Officer, II Circle, Madurai*[4], the relevant observations are at page 482. The position in America is the same. See *Helvering* v. *Mitchell*[5], which refers among others to the earlier decision of that Court in *Paegavant* v. *United States*[6]. Such were the apparently well founded contentions of this learned Advocate-General, but it may not be necessary to pronounce our acceptance of these contentions for the disposal of this case.

The decision arrived at by the appropriate Customs Officer in such proceedings to impose the penalties prescribed , for instance, by section 167 (8) of the Sea Customs Act, is quasi judicial in its scope. That was what was laid down in a number of decisions of this Court, and that was reaffirmed by the Supreme Court in its recent and as yet unreported decision in *Sewpuganrai Indrasanrai Ltd.* v. *The Collector of Customs and others*[7], where S. K. Das, J., said

" In *F. N. Roy* v. *Collector of Customs, Calcutta and others*[8] this Court held that the imposition of a fine under section 167 (8) of the Sea Customs Act was really a quasi judicial act and in the later decision of *Leo Roy Frey* and *another* v. *The Superintendent, District Jail, Amritsar and another*[9] it has been held that in imposing the confiscation and penalties under the Sea Customs Act, the Collector acts judicially. Therefore the view that an order of confiscation or penalty under the Sea Customs Act is a mere administrative or executive act is no longer tenable."

Such an order is liable to correction by the issue of a writ of certiorari.

We have held that the order of the Collector dated 11th March, 1957 was based upon section 178-A (1) of the Sea Customs Act, which is invalid and inoperative. We have also upheld the other two contentions of the learn-

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1. (1957) 3 A.E.R. 286.
2. (1949) 2 A.E.R. 621.
3. (1954) 2 Q.B.D. 336.
4. (1955) 2 M.L.J. 477.
5. 82 L.Ed. 917.
6. 37 L.Ed. 426.
7. Civil Appeal No. 256/54 since reported in 1958 S.C.J. 1199 : 1958 M.L.J. (Cr.) 929.
8. (1957) S.C.J. 734 : (1957) M.L.J. (Cr.), 684. :(1957) S.C.A. 764.
9. (1958) S.C.A. 240 : (1958) S.C.J. 301 : (1958) M.L.J. (Crl.) 289.

ed counsel for the petitioners, on each of which the order of the Collector is liable to be set aside. We therefore allow W.P. No. 384 of 1957 confirm the rule *nisi* and direct the issue of writ of *certiorari*, to set aside the order of the Collector dated 11th March, 1957.

Though the relief asked for by the petitioners in W.P. No. 660 of 1958 is the return of the seized gold to the petitioners, what the petitioners are entitled to is only a writ of *mandamus* to the Collector to hear and determine the questions at issue afresh, without any reference to section 178-A of the Sea Customs Act. A writ of *mandamus* will issue to that effect.

The petitioners will be entitled to their costs in W.P. No. 384 of 1957. Counsel's fee Rs. 750. There will be no order as to costs in W.P. No. 660 of 1958.

V.S. *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR AND MR. JUSTICE BASHEER AHMED SAYEED.

S. Moses and another .. *Petitioners**

Prevention of Food Adulteration Act (XXXVII of 1954)*—Sections* 7 *and* 16*—Object and scope of—Liability of a servant under—'No person shall sell either by himself or any person on his behalf'—If includes agents and servants—Servant when liable absolutely—Difference under English Law.*

The object of the Prevention of Food Adulteration Act is to ensure that the substance sold is not mixed with any other substance not permitted by law. Hence in a prosecution for sale of adulterated food it is not necessary to establish that the adulteration was injurious to health. The offence is complete when once the adulteration is proved, even though the adulteration might be harmless or even beneficial from the health point of view.

The liability of an offender under the Prevention of Food Adulteratuon Act is absolute and does not depend on *mens rea*. Generally speaking the liability is not merely on the master or the primary seller but also on the secondary seller, the servant who actually sells and delivers the goods. But a servant who is not the owner of the goods and who does not sell the goods for his own benefit, but only sells on behalf of his master will not be caught by the absolute liability under section 7 of the Act.

The language of the English Food and Drugs Act is far wider so as to make even a servant who sells on behalf of his master absolutely liable for the offence. Whereas under the law in England even a mere possession of adulterated stuff is made punishable under the Prevention of Food Adulteration Act, in India, mere possession for sale is not made an offence except under section 16 (1) (*b*) of the Act in the case of manufactures of food stuffs. The Indian Act has deliberately deviated from the wide provisions of the English Act and has fixed the absolute liability only on the master or primary seller.

A servant who sells adulterated food for his own benefit will of course be absolutely liable under section 7 of the Act. If a servant, having guilty knowledge, express or implied, of the adulteration, sells on behalf of his master he will be liable for abetment of the offence under section 7 of the Act. But where he merely sells on behalf of his master, no absolute liability need be fastened on him as the section does not make even persons selling on behalf of another punishable.

Pyarimohan Saha v. *Harendranath Ray*, (1929) I.L.R. 57 Cal. 1084, differed.

English Case-law distinguished.

Per Panchapakesa Ayyar, J.—" Sections 7 and 16 of the Prevention of Food Adulteration Act, 1954, will not primarily apply to a servant or secondary seller of adulterated food unless he sold it for his own benefit, and, a servant selling such food on behalf of his master can only be made liable for aid or abetment of the offence on proof of guilty knowledge, express or implied."

Per Basheer Ahmed Sayeed, J.—" A servant who is selling adulterated food stuff without knowledge of the same or without having any part or lot in the adulteration would not be liable for an offence under section 7 of the Prevention of Food Adulteration Act, 1954."

Petitions under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Court of Session of the Salem Division in C.A. No. 263 of 1957 (C.C. No. 202 of 1957 on the file of the Court of the Sub-Divisional First Class Magistrate, Sankari).

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* Crl. R.C. Nos. 191 and 192 of 1958. 13th November, 1958.
(Crl. R.P. Nos. 180 and 191 of 1958.)

S. Mohan Kumaramangalam and *N. Srinivasagopalan,* for Petitioners.

The Public Prosecutor (*P. S. Kailasam*), for the State.

When the petitions came on for hearing in the first instance the following order of reference was made by

Somasundaram, J.—These are revisions by the two accused who were tried and convicted by the Sub-divisional First Class Magistrate, Sankari, under sections 16 (1) and 7 read with section 2 (1) (*b*) and (*j*) of the Prevention of Food Adulteration Act, and rule 29 framed under the said Act. The convictions and sentences were upheld by the Sessions Judge of Salem.

The facts relating to the case are these : There was a society called the Government Servants' Co-operative Society, Mettur township. The first accused was the manager of the society while the second accused was the sales clerk in the grocery section. P.W. 1 is the Food Inspector of Mettur township. On 18th June, 1957, P.W. 1 purchased 1½ pounds of Bengal gram powder from the second accused, the sales clerk. The first accused was not present at that time. The usual formalities which the Food Inspector observes when he purchases for the purpose of testing was observed and there is no dispute about it. The Bengal gram powder was sent to the public analyst. The public analyst in his report, Exhibit P-2 has stated that the sample sent was found to contain an artificial water soluble yellow colouring matter derived from coal tar and he gave it as his opinion that the sample is adulterated. This opinion of the public analyst is not disputed and the presence, therefore, of artificial water soluble yellow colouring matter derived from coal tar is beyond question. This does not fall under any of the exemptions of coal tar dyeing as provided under the rules. A faint attempt was made in the lower Court to urge that it was soap powder so as to bring it within the exemption but that was rightly rejected by the Courts below and was not argued before me.

This society was formed under the Co-operative Societies Act. There was a Board of Directors of which the Divisional Engineer is the Chairman. The Board consists of nine members and the stores are managed by this Board of Directors. There is a purchasing committee appointed by this Board and i is they who recommend or purchase on behalf of the society and the article is sold in the society. It was considered to be the best in quality. Either while purchasing or afterwards no warranty was taken by the Society from its vendors for the purity of the powder sold.

That the powder sold is adulterated within the meaning of that expression under the rules is not disputed. That the society is a company within the meaning of section 17 of the Prevention of Food Adulteration Act is not also disputed. Section 17 of the Act is as follows :

> " Where an offence under this Act has been committed by a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence, etc., etc."

In the *Explanation,* 'Company' is defined as

> " Any body corporate, and includes a firm or other association of individuals."

As already stated, the first accused who was the manager of the society was on leave at the time of the same. There is an Honorary Secretary also for the Society. Though the first accused is called the manager of the company there is no proof that he is the manager within the meaning of that expression in section 2 (9) of the Indian Companies Act, nor is there any evidence that he was in charge, or was responsible for the company or for the conduct of its business.

The offence with which the accused are charged is one under section 7 of the Prevention of Food Adulteration Act which is punishable under section 16 (1) (*a*) of the said Act.

Under section 7 of the Act :

> " No person shall himself or by any person on his behalf manufacture for sale, or store, sell or distribute—
>
> (i) any adulterated food."

Section 16 (1) says:

"If any person—

(*a*) whether by himself or by any person on his behalf............sells or distributes, any article of food in contravention of any of the provisions of this Act or of any rule made thereunder, etc., etc., shall be punishable...."

The firsxt accused was on leave on the day of the sale. He does not come within the definition of Manager under the Indian Companies Act and there being no proof that he was in charge or was responsible to the company in the conduct of the business of the company, he cannot be brought within the scope of sections 7 and 16 of the Act. So, as far as he is concerned, in my opinion, the conviction and sentence cannot stand and they must be set aside and this accused acquitted. The fine, if paid, will be refunded.

The real trouble arises with regard to the second accused. He was only a sales clerk. He has to do the duties assigned to him, namely, to give the articles asked for by the purchasers and take the price in return, and account for the prices. It is not suggested that he knew that this Bengal gram powder was adulterated. In those circumstances, the question arises as to how far the second accused is liable.

That knowledge or *mens rea* is not necessary in such cases is clear from the wording of the section itself. The section does not say 'no person, knowingly, or having reason to believe that the food is adulterated, shall sell', etc. The whole Act and the sections contained therein are based on the English statutes like the Food and Drugs Act of England. It has been held in a series of decisions that *mens rea* or knowledge is not necessary in such cases.

In *Betts* v. *Armstead*,[1] the Court had to consider whether knowledge is necessary when the section merely states as follows:

"No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature etc., etc."

There what was sold was a loaf of bread which contained a quantity of alum. The defence of the accused was that he did not know that the bread contained alum. The trial Court dismissed the complaint. But in the Queen's Bench Division, Cave, J., after referring to the wording of the section says:

"Those terms are not in any way qualified, but it was suggested that the justices ought to read into the section the word 'knowingly', and they adopted that suggestion. That word is not to be found in the section, and it is clear from the words of other sections of the Act that the word 'knowingly' was intentionally omitted from section 6."

He, therefore, found that the decision of the justices was wrong. In this opinion, A.L. Smith, J., also concurred and the case was remitted to the lower Court.

In *Dyke* v. *Gower*[2], the facts were these: the respondent, a retail milk seller, poured into a pail eight barn gallons of unskimmed milk, which she sold therefrom in small quantities to her customers, dipping it out of the pail from time to time with a measure. The sale of the contents of the pail extended over a space of between four and five hours, during the whole of which time, owing to the neglect of the respondent to keep the milk stirred, the cream was continually rising to the surface. When, not more than two quarts of milk remained in the pail, the appellant purchased of the respondent a pint of milk, which was served to him from the pail, and which, upon analysis, showed a deficiency of 33 per cent. of fatty matter. The respondent did not disclose the deficiency to the appellant. The deficiency was entirely due to the manner in which the earlier customers had been served. Lord Coleridge, C.J., dealing with the case observes as follows:

"The milk seller sold the milk in that condition, and she did so in one sense fairly enough; for in the absence of any evidence to the contrary, I will assume that she did not gain by it—that is to say, that she sold the upper portion of the milk which contained an excess of fat at the same price as that at which she afterwards sold the lower portion, which was deficient in fat. But this Act was passed with the object, not of punishing the seller, but of protecting the buyer, and of insuring, so far as it is possible to insure, such a result, that a person who buys an article of a particular description should get a genuine article, and one which contains the proper quantity of the different elements that an article of that description ought to contain........Then the section goes on, "And no person

1. L.R. (1888) 20 Q.B.D. 771.

2. L.R. (1892) 1 Q.B.D. 220.

shall sell an article so altered"—that is, altered physically, altered by the abstration of a part of it so as to injuriously affect its quality—'without making disclosure of the alteration.' Here the respondent has admittedly sold milk so altered without making any disclosure. Has she not then been guilty of an offence against the section ?"

The argument was that the alteration had not been made with the prohibited intent; and dealing with that argument Lord Coleridge, C.J., says :

"It is not necessary in the interests of the public to prohibit the mere alteration of an article of food, unless the alteration is coupled with the intent of selling it in its altered state without notice, for the mere alteration without such intent may be perfectly innocent. Where, however, the alteration is followed by actual sale, the intent with which the article was altered must become perfectly immaterial, the injury to the purchaser being just the same whether there was a wrongful intent or not."

Then referring to *Pain* v. *Boughtwood*[1], Lord Coleridge, C.J., observes :—

"it was held that *mens rea* was not a necessary ingredient in the offence of selling an altered article under section 9".

In this opinion Wright, J., concurred and held that the defendant's knowledge of the adulteration was perfectly immaterial.

These decisions in *Dyke* v. *Gower*[2], and *Pain* v. *Boughtwood*[1], were followed in *Morris* v. *Corbett*[3], and in this decision Williams, J., says :

"This act is what is called benevolent legislation, and we must apparently put a benevolent construction on it."

To the same effect is the decision of Lord Goddard, C.J., in *Lamb* v. *Sunderland and District Creamery, Ltd.*[4], where he observes :

"In this case it was not necessary to prove *mens rea*. All that needed to be proved was that there was a sale to the prejudice of the purchaser of something which was not of the nature, substance, or quality demanded by him......"

So, the above decisions are clear authority for the position that *mens rea* or knowledge is not necessary and the sections also do not impose such a condition to prove the offence or guilt against the person concerned.

It is contended by Mr. Mohan Kumaramangalam that the wording of the section is such that it excludes a servant. The section, as already stated, says :

"No person shall himself or by any person on his behalf, etc."

In section 16 also

"If any person—

(*a*) whether by himself or by any person on his behalf.................".

According to the contention, this clearly suggests that the servant is not liable but the master or the principal alone is liable. I must say at the outset that this contention has considerable force. The wording of the section is not like the wording in the English Act 'No person shall sell..' It is contended by the Public Prosecutor that this belongs to the category of offences where there is an absolute prohibition of sale and that "any person either by himself or any person on his behalf" includes the servant as well. He relies on the decision in *Hotchin* v. *Hindmarsh*[5]. were Lord Coleridge, C.J., observes as follows :—

"In my opinion, a person who takes the article in his hand, and performs the physical act of transferring the adulterated thing to the purchaser, is a person who sells within this section."

Mathew, J., also concurred with that opinion and observes as follows :

"Section 6 enacts that 'no person shall sell to the prejudice of the purchaser,' etc. It is contended that we should read this as 'no person unless he be a servant.' Why should those words be introduced ? It is clear from the series of sections following section 6 that the Legislature meant to deal with the person who does the physical act........It would be an extraordinary interpretation of the Act to hold that even where it was shown that the person who did the act was guilty, his employer alone should be liable to be convicted.

... The result might be that while the guilty person would escape, his innocent employer might be convicted."

I have myself held in another case (Crl. Appeal No. 138 of 1957) an appeal by the State against the acquittal of the second accused in that case who was a servant

1. L.R. (1890) 24 Q.B.D. 353.
2. L.R. (1892) 1 Q.B.D. 220.
3. 56 Justice of the Peace 649.
4. (1951) A.E.L.R. 923.
5. L.R. (1891) 2 Q.B.D. 181 at 186.

of the first accused that the second accused is liable. I have held that the trial Court's interpretation of section 7 that both of them are not liable was wrong and found the servant also guilty of the offence. At that time the respondent was not represented by any counsel and this aspect of the case was not presented to me. Now that it is brought to my notice, I find that there is considerable force in the argument. Decisions which hold that *mens rea* is not altogether ruled out in all cases are relied on. The decision in *Williamson* v. *Norris*[1], is also relied on to show that the servant is not liable. I have already pointed out that with regard to these classes of cases *mens rea* is not necessry and that there is an absolute prohibition. In fact, in the decision in *Brown* v. *Fovt*[2], it is pointed out that both the master and the servant will be liable. The decision in *Pyarimohan Saha* v. *Harendranath Ray*[3], is also relied on by the Publie Prosecutor to show that the agent also is liable. The section there *viz*., section 11 speaks of 'the seller or agent selling the article', therefore the agent or servant is within the prohibition of the words 'no person shall sell'.

I must confess to some difficulty in interpreting section 7 and section 16 of the Prevention of Food Adulteration Act. The expression 'No person shall himself or by any person on his behalf' seems to suggest liability of the master or the principal or owner whether he sells the article himself or by a servant. This question is one of importance and is of constant occurrence and it is likely that two views may be taken of the section, particularly in view of the policy and the principle of the Act being to prohibit all sales by whomsoever it may be. It is better that an authoritative decision is given by a Bench of this Court. The papers will, therefore, be placed before my Lord the Chief Justice for orders as to posting this case before a Bench.

These petitions then came on for hearing before a Bench (Panchapakesa Ayyar and Basheer Ahmed Sayeed, JJ.).

S. Mohan Kumaramangalam, for 1st Accused.

M. Srinivasagopalan, for 2nd Accused.

The Public Prosecutor (*P. S. Kailasam*) on behalf of the State in both the cases.

The Order of the Court was made by

Panchapakesa Ayyar, J.—These two cases have been directed to be posted before this Bench by the Hon'ble Chief Justice on a reference by Somasundaram, J., as to whether a servant selling goods on behalf of his master will fall primarily and directly within the scope of the penal provisions of sections 7 and 16 of the Act XXXVII of 1954, the Prevention of Food Adulteration Act, as Somasundaram, J., who had been *prima facie* of the view that the servant will also be absolutely liable primarily and directly for the sale of adulterated food on behalf of the master in two cases decided by him, sitting singly, (Criminal Appeal Nos. 84 and 138 of 1957), both *ex parte* felt some doubt about the correctness of his view regarding the law, and wanted it to be clarified and settled by a Bench.

The facts in these two cases are briefly these :—There is a Society called the Government Servants' Co-operative Society, Mettur township, Salem District. The first Accused, Moses, was the manager of the Co-perative Society, while the second accused Rangaswamy, was the sales clerk in charge of the grocery section. P. W. 1 was a member of the society, and was also the Food Inspector of Mettur township. He got information that the Bengal gram powder sold by the Society, though considered by the public to be the best Bengal gram powder available in the market, was adulterated with a brand of coal tar dye, not permitted under the Act. So, on 18th June, 1957, P.W. 1 purchased 1½ pounds of Bengal gram powder from the second accused, the sales clerk in charge of the grocery section for 29 nP. He observed the usual formalities prescribed when purchasing a food stuff for the purpose of testing. The Bengal gram powder was sent to the public analyst. The public analyst found that the Bengal gram powder contained an artificial water soluble yellow colouring matter derived from coal tar and gave it as his opinion that the sample was adulterated.

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1. L.R. (1899) 1 Q.B.D. 7.
2. 66 L.T.R. 649.
3. (1929) I.L.R. 57 Cal. 1084.

There was no contention before the Court (S.D.M. Sankari, who tried the case) that the Bengal gram powder in question was not adulterated. The only defence, on the facts was that the adulteration was not prejudicial to health and would not injure anybody, but only added colour to the substance and made it attractive to the buyer. That, of course was an untenable plea. It is well-settled that, under the Prevention of Food Adulteration Act, the adulterated substance need not be poisonous or injurious. Indeed, it may even be conducive to health. The object of the Act is to see that the substance sold is not mixed with any other thing not permitted by law. Thus, if ghee is adulterated with lard of pig or with beef suet, it may be that from the purely physical health point of view the mixture may be more nutritious. But the offence is complete, because a substance not recognised by law has been used for mixing. So the plea will fail like a plea that the adulterer is a healthier man than the husband, in a charge of adultery.

Both the accused raised the plea in law that they were not liable for the primary offence under section 7 of the Act. The first accused contended that he was on casual leave on the day when the Bengal gram powder was sold by the 2nd accused to P. W. 1, and that at no time was he in charge of the sales, or responsible to the company for the sale, and that he was not therefore a seller at all. The second accused contended that he never sold the Bengal gram powder himself, that is, for his own benefit, but only on behalf of the Co-operative Society, and so will not be liable directly under section 7.

Both the accused were convicted by the Sub-Divisional First Class Magistrate, Sankari, Salem, under sections 7 and 16(1) read with section 2(1) (*b*) (*j*) and rule 29, and were sentenced to pay a fine of Rs. 50 each. They appealed to the Sessions Judge, Salem, who confirmed the convictions and sentences. Then they filed Crl. Rev. Cases Nos. 191 and 192 of 1958 in this Court. Somasundaram, J., acquitted the first accused, Moses, on the ground that he was not as a matter of fact in charge of the sales of the Co-operative Society, and was not a seller, and had not sold the Bengal gram powder himself, or got it sold by the 2nd accused. He therefore, set aside the sentence of fine and directed the fine if paid, to be refunded to the 1st accused. Therefore, Crl. Rev. Case No. 191 of 1958 relating to the first accused, is unnecessary, as the question of law referred to us is not necessary to be decided for disposing of the case as against the first accused. The question of fact decided in his favour, namely, that he was not the seller of the Bengal gram powder, and had not got it sold on his behalf by the second accused, is conclusive. We are, therefore, not called upon to deal any more with Crl. Rev. Case No. 191 of 1958, as rightly contended by Mr. Mohan Kumaramangalam appearing for the first accused, and conceded by the learned Public Prosecutor. That petition has been disposed of by Somasundaram, J., himself and accused 1 has been acquitted.

Now we come to Crl. Rev. Case No. 192 of 1958, relating to the second accused. The question here is whether the 2nd accused is right in his plea that he will not come directly within the purview of section 7 and the absolute liability thereunder, as he did not sell the Bengal gram powder himself or cause any person to sell it on his behalf. Mr. Srinivasa Gopalan, the learned counsel for the 2nd accused, urges vigorously that absolute liability is a terrible thing, as it does away with *mens rea*, or guilty knowledge, required under the law for most offences, and that it should not be imposed on any one unless the wording of the charging section clearly applies. According to him, the Legislature intended only the primary seller, selling the goods himself or by any person on his behalf, to have absolute liability, fastened on him, regardless of guilty knowledge express or implied, and that the servant selling the goods not for himself but for the master would only be liable, under the ordinary law, for aiding and a betting the offence of selling the adulterated food, and that, for abetment, where the general law would apply, guilty knowledge, express or implied, should be proved by the prosecution. He did not deny that if the servant adulterated the food himself, or if the servant knew that the food he was selling was adulterated or had reason to believe, by exercise of due diligence, that the food he was selling was adulterated, he would be liable for abetment of

the offence. Thus if a servant waters the milk himself, or knows that the milk he sells is watered milk, or has reason to believe that it is watered, he will be guilty of abetment. Mr. Srinivasa Gopalan does not dispute that. What he disputes is the absolute liability of the servant who is perfectly innocent and has no guilty knowledge, express or implied, and merely sells the adulterated food on behalf of the master, and not for his own benefit. According to him, the phrase in section 7, ' any person either by himself or any person on his behalf ', means that the sale should be by a person for himself or through another for his benefit. The learned Public Prosecutor joined issue on this point and quoted several English decisions for the position that absolute liability will fasten itself on the servant as well as on the Master selling the goods. The leading English case he relied on is the House of Lords ruling in *Pharmaceutical Society* v. *London and Provincial Supply Association*[1], where it was held, at page 865, as follows :—

"The act of selling, the act of compounding, and every other definite and particular act mentioned in the 1st section (of the Food and Drugs Act of England), and in the sections by which penalties are imposed, are struck at, whether the person who does them is a principal to whom the business belongs, or any one whom he employs to carry on the business."

It was expressly held that the seller, whether the master or servant, will be liable under the penal provisions of the English Act. Coleridge, C.J.'s observations in *Hotchin's case*[2]:

" A person who takes the article in his hand and performs the physical act of transferring the adulterated thing to the purchaser is a person who sells within the section ",

and similar observations in several other English rulings to the same effect were relied on by the learned Public Prosecutor. Mr. Srinivasa Gopalan relied on the ruling in *Williamson* v. *Norris*[3], where Lord Russel held that, under the Licensing Act, a servant selling liquor in unlicensed premises without guilty knowledge, express or implied, would not be guilty under the Act, and that some kind of aid or abetment should be proved. But that was not under the Food and Drugs Act of England which is more draconian in its scope. We may take it that under the English Food and Drugs Act, absolute liability will fasten not only on the primary seller, the master, but also on the secondary seller, the servant who actually sells on behalf of the master and delivers the goods.

It is not disputed by Mr. Srinivasa Gopalan, and cannot be disputed, that the servant who sells and delivers goods to a customer will also be a seller within the meaning of the definition in the English Act as well as in the Indian Act. A Full Bench ruling of this Court, in *Radhakrishna Rao* v. *Province of Madras*[4], has held categorically that a servant can also be a seller in spite of the sale being in the presence of the master, the primary seller. That ruling was under the Sales Tax Act. But it may apply here too. The servant will be a seller within the definition under the Prevention of the Food Adulteration Act also. But Mr. Srinivasa Gopalan, while conceding this, and also conceding that it is enough if the servant, thought not the owner, sells the goods for his own benefit, urges that a servant who does not sell the goods for himself that is for his own benefit, will not be caught by the provisions of section 7, as he sells them on behalf of the Master. We agree. The terms of the English Food and Drugs Act are far wider and will certainly include the liability of the servant, the secondary seller, even when he sells only on behalf of the master, and, indeed, even the persons who are merely in possession of the adulterated food-stuffs, whereas under the Prevention of Food Adulteration Act a mere possession of adulterated food for the purpose of sale is not made an offence except in the case of manufacturer of the food-stuffs under section 16(1) (*b*) of the Act. In other words, neither the master the primary seller, nor the servant the secondary seller, can be convicted and punished under the Preventive Food Adulteration Act for mere possession of adulterated food or materials employed for adulteration unless he is the manufacturer of the food. Thus, if he manufactures baby food he will be liable for posses-

1. L.R. (1880) App. Cas. 857.
2. L.R. (1891) 2 Q.B. 181.
3. L.R. (1899) 1 Q.B. 7.
4. (1952) 1 M.L.J. 494.

sion, but not for mere possession under the Act, when he is only the seller whether as master or servant. The learned Public Prosecutor has to concede this.

That shows that the English Act is far wider in its scope in fixing absolute liability than the Indian Act. This is possibly because England is a highly educated country, where there is 100 per cent literacy and the population is accustomed to enlighened public health rules for more than two centuries, whereas India is a very backward country, with 15 per cent. literacy and 85 per cent. illiteracy, and people plunged in dark ignorance regarding scientific matters and public health rules and even elementary things like the consequences of food adulteration. When it is a bit complex, as in this case of a coloured coal tar dye being used, no ordinary servant who sells can be expected to be aware of the adulteration unless he is aiding and abetting the offence. It is obvious that laws of a country are enacted by an enlightened legislature to suit the conditions of that country. Therefore, in our opinion, the Prevention of Food Adulteration Act of 1954 has deliberately refrained from enacting the wide provisions of the Food and Drugs Act of England, and has restricted the fixation of absolute liability to persons like master, the primary sellers, who are expected to be more educated than the servants or secondary sellers and to know the consequences of the sale of adulterated food-stuffs better.

This is also seen to be so because, under section 16 of the Act, minimum punishment of a draconian character have been prescribed for the sale of adulterated food for the second or third time. It is well-known that in all enlightened systems of jurisprudence a minimum punishment is never prescribed except where it will be justified by public interests and where the subject also warrants it: It is also to be noticed that these draconian minimum punishments are prescribed not merely for the second and third convictions but for the second and third offences. A servant may be selling adulterated food 100 times per day, and, even before he is convicted for one offence, he will render himself liable for the minimum punishments prescribed for the second and third and subsequent offences. The English law prescribed for less drastic punishments right through. Our Legislature was, in our opinion, well aware of these dire consequences, and has therefore satisfied itself with restricting the absolute liability to the educated master, the primary seller. If the master is caught hold of and punished drastically, there is no need to catch hold of the servant also and fasten the absolute liability on him even without any guilty knowledge, express or implied. It is something like the ancient Hindu adage that it is enough to catch a cobra by its head, and then the belly and tail will be controlled or like the Nyaya saying that when the trunk is cut the branches will fall by themselves.

So, the ground to extend the absolute liability to the servant selling on behalf of the master urged by the learned Public Prosecutor, does not commend to us. It is enough if the servant selling goods for his own benefit (though not the owner) is saddled with absolute liability and if the servant having guilty knowledge, express or implied, and selling on behalf of the master, is punished for abetment of the offence under section 7. No absolute liability need to be fastened on him in public interests when he sells only on behalf of the master.

The learned Public Prosecutor concedes that measurers, weighers, packers, etc., of the adulterated food stuffs sold will not come within the purview of section 7. But he says that the servants who sell the goods, deliver them and receive the money will be liable under section 7. The distinction he makes cannot stand. Often, in a big shop a clerk sells the goods, the clerk at the counter receives the money and the porter at the gate delivers the goods. Which of the three is to be booked under section 7? The learned Public Prosecutor may say, "all the three". Then the jails will be unnecessarily filled with a large number of innocent people, as urged by Mr. Srinivasa Gopalan. As already observed, if there is guilty knowledge, express or implied, servants can be booked for aiding or abetting the offence. They can also be booked directly under section 7 if they sell the goods themselves, that is, for their own benefit.

The learned Public Prosecutor says that, whatever may be the reason, the Legislature has enacted section 7 in terms which make the servant also absolutely liable unless this Court declares section 7 *ultra vires* of the Constitution. We cannot agree. The effect of the section is not what the learned Public Prosecutor considers it to be. Section 7, in our opinion, does not fasten any absolute liability on the servant or the secondary seller, unless he sells the goods for his own benefit. The phrase used in section 7 means, in our opinion, that the sale should be by a person for himself or by any person on his behalf. It is significant that section 7 does not say that a person selling on behalf of another will also be liable. The word 'himself' must be given its natural meaning in the context, and the natural meaning, in the context in our opinion, is what we have stated above. So the sections and rulings under the English Act have no application to India, as the English Act does not have the words, ' himself or any person on his behalf'. It has simply the word " sells ".

The learned Public Prosecutor then relied on a ruling of a Bench of the Calcutta High Court in *Pyarimohan Saha* v. *Harendranath Ray*[1], where the Bench held that absolute liability would fasten on the servant, or the secondary seller also, even when selling goods on behalf of the master, when construing the provisions of the Bengal Food Adulteration Act. Though the wording in that was much the same as in the Prevention of Food Adulteration Act, we are unable to agree with the interpretation put by the Bench which went largely on the English rulings referred to above without considering the fact that the English rulings related to the English Food and Drugs Act which is far wider in its scope in fixing absolute liability than the Indian Act, and much more lenient in the punishment for the first and subsequent offences. With respect, we are unable to follow the interpretation put by the Bench of the Calcutta High Court with regard to a similar wording like the one used in the Prevention of Food Adulteration Act, 1954.

In the end, therefore, we hold that sections 7 and 16 of the Prevention of Food Adulteration Act, 1954, will not primarily apply to the servant, the secondary seller of adulterated food unless he sold it for his own benefit, and that the servant selling the food on behalf of his master can only be made liable for aid or abetment of the offence on proof of guilty knowledge, express, or implied. As no such guilty knowledge, express or implied, has been brought home to the second accused Rangaswamy, it follows that his conviction and sentence must be set aside, and be acqutited. We do so accordingly, and direct that the fine, if paid, be refunded to him.

Basheer Ahmed Sayeed, J.—I agree, with my learned brother in the conclusions he has arrived at. I only wish to add a few words to the judgment just now pronounced by my learned brother.

The question that has been raised in this Criminal Revision Case (C. R. C. No. 192 of 1958) is as to whether the servant of a master who sells adulterated food-stuffs such as the one in the present case is also liable under section 7 and section 16 of the Prevention of Food Adulteration Act (XXXVII of 1954). It is beyond question that under section 7 of the Prevention of Food Adulteration Act (XXXVII of 1954), the master is liable for selling goods either by himself or through his servant or any agent, for the matter of that. The language of that section warrants this interpretation. It is also beyond question that when the servant sells the goods on behalf of his master or any company, limited or otherwise, he does sell the goods. The act of selling is done by him. He delivers the goods and receives the price. But it has to be seen whether the fact that the servant sells goods on behalf of the master would make him liable for any offence, in case the foodstuffs sold happen to be adulterated on analysis and examination. The question is whether the language of section 7 warrants such an interpretation.

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1. (1929) I.L.R. 57 Cal. 1084.

The learned Public Prosecutor has relied on a series of English decisions commencing from 1880 onwards for his proposition that there is an unqualified liability on the part of the servant also for the sale of adulterated stuff, even as the master or the company under whom the servant serves is liable for such a sale. In *Pharmaceutical Society* v. *London and Provincial Supply Association*[1], the term ' person ' is declared to include a servant as well. There can be no exception to this for the term ' person ' will include master, servant and agent, etc. It is also laid down there that he who sells, whether master or servant, commits an offence. In *Hotchin* v. *Hindmarsh*[2], it has been held that the servant is responsible, for the sale of adulterated food. The man who takes the price and gives the goods is described to be the seller. In *Derbyshire* v. *Houliston*[3], also liability of the master as well as his servant has been declared, if the master or the servant sells adulterated stuff. It is immaterial whether the master is alone the owner of the goods entitled to the proceeds of the sale and the servant is not such an owner but only a paid man. The mere act of selling either by the master or by the servant has been held to be an offence, if the foodstuffs sold happen to be adulterated. In *Brown* v. *Foot*[4], also it was held that the servant was the seller, though for civil purposes the servant must be established to be cognizant of the adulteration. The decision held that for a criminal conviction a master and the servant stand on the same footing. The relevant English statute, according to all these decisions, imposes an absolute liability both on the master as well as on the servant in regard to the offence of sale of adulterated foodstuffs under the Food and Drugs Act. The servant who delivers the goods for the price to be paid is certainly the seller, according to these decisions, and whether it be on his own behalf or on behalf of the master it does not matter, and the servant will nevertheless be a seller, and such a seller under the English Food and Drugs Act is liable to the penalty imposed by the law. The learned Public Prosecutor explained that under the English Act, as even under the Indian Act with which we are now concerned, it is the interest of the purchaser that is kept paramount and that is why, whether the seller be the master or whether he be the servant, no sale should take place to the prejudice of the purchaser and such an object could be ensured only by making both the master and the servant, whoever may be the seller, absolutely liable for the offence of selling adulterated foodstuffs under the said Act. The question then is whether the English and the Indian statutes stand on the same footing without there being distinction in the scope and application of the relevant sections of the two statutes.

So far as the English cases relied on by the learned Public Prosecutor and elaborately discussed by our learned brother Somasundaram, J., in the reference are concerned, the propositions laid down in those decisions seem to be unexceptionable, if the terms of the charging and penal sections of the English Food and Drugs Act are to be kept in view. Under the English Food and Drugs Act, the underlying scheme, no doubt, seems to be that there should be an absolute liability cast upon the master as well as the servant for the sale of adulterated stuff and no person should be allowed to escape by pleading that he had no knowledge of the adulteration of the foodstuffs or that he was merely a servant under the master who had employed him for the purpose of selling. It is true, that the words ' knowingly ' or ' with knowledge ' have not been used in the English Food and Drugs Act, nor do they occur in the Indian Statute. In the Indian Prevention of Food Adulteration Act nowhere are the words ' knowingly ' or ' with knowledge ' to be found in the relevant sections. But it will be seen, on a careful analysis of the language and the terms used in the English Act as compared with those used in the Indian Act, the scheme underlying the sections in the Indian Act seems to be rather different. While the English Act is too wide in its scope and application to offences under the Food and Drugs Act, the same does not appear to be the case with the the Indian Prevention of Food Adulteration Act. A reading of section 1 (2) of the English Food and Drugs Act of 1938 and a comparison of the language used in that Act with

1. L.R. (1880) A.C. 857.
2. L.R. (1891) 2 Q.B. 181.
3. L.R. (1897) 1 Q.B. 772.
4. 66 L.T. 649.

the language used in section 7 of the Indian Act brings out the difference in more than one respect. In section 1 (2) of the English Act, the language is :

"No person shall sell or have in his possession for the purpose of sale any food or drug to which any substance has been so added."

But section 7 of the Indian Prevention of Food Adulteration Act would say :

"No person shall himself, or by any person on his behalf, manufacture for sale, or store, sell or distribute any adulterated food, any misbranded food, any article of food for the sale of which a licence is prescribed...."

The language of section 7 in its scope and application seems to restrict itself in the first instance to that person who shall himself sell and in the second instance to that person who causes it to be sold by any other person on his behalf. But it does not seem to extend to or comprehend within its scope the person who sells on behalf of another. If that were the intention, the Legislature should have inserted the words "or on behalf of any other person" after the words "No person shall himself sell or by any person on his behalf". Even otherwise, if the intention of the Legislature was that there should be an absolute liability imposed upon a servant or an agent for the sale of adulterated foodstuffs, the Legislature would have adopted the same language as has been used in section 1(2) of the English Act. This Act must be presumed to have been before the Legislature at the time the law was enacted. Neither of these things having been done, it is difficult to hold that the decision of the English Courts, which interpreted the English Act, the language of which happens to be quite different from the language employed in the Prevention of Food Adulteration Act, would be of any assistance to the learned Public Prosecutor.

That the scheme of the English Act seems to be different from the scheme of the Indian Act also appears to be clear from a comparison of the penal sections in the two Acts. If you take section 16 of the Prevention of the Food Adulteration Act, the first offence, the offender is to be punished with imprisonment for a term which may extend to one year or a fine which may extend to Rs. 2,000, and for the second offence, with imprisonment for a term which may extend to two years and with fine. But this does not happen to be the case in the English Act. In the English Act, the first offence is to be punished only with a fine and it is only for the second offence that the punishment is made a little more severe, subject to certain conditions, and obviously imprisonment is imposed only for the second offence.

Further, if the defences available under the English Act are to be compared with the defences that are made available under the Indian Prevention of Food Adulteration Act, there also the scheme seems to be quite different. In the English Act, for instance, the offender can put up the defence that the adulteration has not been injurious to health, but such a defence is not available to the offender under the Indian Prevention of Food Adulteration Act. There is difference also in the other defences available under the two Acts. So that when the scheme of the English Act differs in so many respects from that of the Indian Act, it will not be proper to rely upon the English decisions for the interpretation of the sections of the Indian Prevention of Food Adulteration Act. The interpretation of the Prevention of Food Adulteration Act is to be on the actual terms and the language used by the statute and the intention with which the Legislature would have employed the language and the terms used in the sections of this Act. It is plain that under the Indian statute, the servant or the agent has been left out and the principal alone is made liable absolutely for the offence. Section 7, as it stands, does not warrant the inference that the servant or agent is also liable along with the master or irrespective of or independently of the master or employer.

The learned Public Prosecutor also relied upon two Indian decisions. The first one was *Pyarimohan Saha* v. *Harendranath Ray*[1], wherein a Bench of the Calcutta High Court held that there was absolute liability imposed upon the servant also if he sells goods on behalf of his master. But a reading of that decision clearly shows

1. (1929) I.L.R. 57 Cal. 1084.

that the learned Judges followed only the English decisions as the basis of that judgment and the Bengal Act is not exactly the same as the Indian Statute. *Brown* v. *Foot*[1], and *Hotchin* v. *Hindmarsh*[2], have been referred to in that decision. The other decision relied upon by the learned Public Prosecutor is *Radhakrishna Rao* v. *Province of Madras*[3]. But this decision was cited more by way of analogy in support of the proposition that the learned Public Prosecutor was sponsoring, *viz.*, that the word 'sale' as defined in the Prevention of Food Adulteration Act was of much wider scope than the word "sale" as defined in the Sales-tax Act. There can be no controversy with regard to this. It is also quite true that a servant can be seller without being the owner of the goods himself. But the question here in the instant case is whether he will come under the penal sections of the Prevention of Food Adulteration Act if he does not sell the goods himself but sells them only for and on behalf of his master. Curiously enough, it will be noticed that in the English Act the word "sell" is not defined anywhere, but in the Indian Act, the word "sell" is defined very elaborately. If it were the intention that sales by all persons, whether with knowledge or without knowledge, were to be brought within the scope of the penal sections of the Indian Prevention of Food Adulteration Act, then certainly, nothing could have prevented the Legislature from adopting the very language and the terms of the various sections that were already found in existence in the English Act, *viz.*, the Food and Drugs Act. But the Indian Legislature seems to have departed very considerably from the scheme of that Act in using the language both in the charging as well as the penal sections of the Act. There must be good reason for this departure and it must be presumed to be deliberate.

No doubt, a person, who knowingly or with knowledge of adulteration sells foodstuffs, should not be allowed to escape. But the real question here is whether the language used in section 7 warrants the inclusion of the person who sells without knowledge of the adulteration. I am of opinion that obviously such a person cannot be so included, because the intention and the meaning of the language does not lend scope to the inclusion of a person who seeks to sell or offers to sell or exposes for sale adulterated goods on behalf of his master or employer. The clear language of section 7 is to the effect that a person should himself sell or sell through any other person on his behalf, in order to be brought within the mischief of that section, and the provision cannot be extended to include what has not been actually intended by the Legislature, *viz.*, that a person who sells on behalf of another should also be made liable to the penalties prescribed. Some meaning or significance has to be attached to the word 'himself' and to the words "by any other person on his behalf" occurring in the Indian Statute. They cannot by any means be ignored when the true intention of the Legislature is to be found out.

In this view, neither the English decisions cited before us nor the Calcutta decision would be of any avail to the learned Public Prosecutor. On the other hand, as my learned brother has pointed out, if the servant has knowledge of the adulteration and he still sells the foodstuffs, he will certainly come within the mischief of the ordinary penal law and could be charged for abetting or aiding the offence under the Food Adulteration Act committed by his master. But, in so far as the scope of the sections, which we are called upon to interpret, is concerned, it is difficult to hold that the servant could also be held liable in an absolute manner, without attributing to him and proving any knowledge on his part, for the mere act of selling adulterated stuffs on behalf of his master. If such were the case, then the consequences would be indeed very serious, as has been pointed out by my learned brother. I do not wish to expatiate on that aspect. A servant might be transacting a hundred sales of the same adulterated foodstuff in a day and if the interpretation which is sought to be put upon the language of section 7 by the learned Public Prosecutor is to be accepted, he will be committing a hundred offences and will be liable for a hundred prosecutions. One could even go to the extent of saying that he has been continuously committing the offence all the time he has been selling the adul-

1. 66 L.T. 649.
2. L.R. (1891) 2 Q.B. 181.
3. (1952) 1 M.L.J. 494.

terated stuff and it may be a continuous chain of offences, all for the benefit of his master. It is really unthinkable that the Legislature could have intended such a consequence when it deliberately omitted to include in express or implied language any servant who is authorised to sell goods on behalf of his master, whether it be an individual or a company.

I am, therefore, inclined to state that the answer to this reference should be no other than that the servant, who is selling adulterated foodstuff, without knowledge of the same, or without having any part or lot in the adulteration, would not be liable under section 7 of the Prevention of Food Adulteration Act (XXXVII of 1954). The answer is in the negative to the reference and in consequence, Criminal Revision No. 192 of 1957 will be allowed, and the fine, if any, which has been imposed, will have to be refunded.

R.M. — *Reference answered accordingly and Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE BALAKRISHNA AYYAR.

Arusami Goundan .. *Appellant**

Criminal Procedure Code (V of 1898), *sections* 337 (2) *and* 339 (1)—*Commitment of person to whom pardon has been tendered—Examination of the approver in the Sessions Court also after he retracted in the committal Court, from his confessional statement—It essential before commitment under section* 339 (1).

The condition of the pardon is that the approver must make a full and true disclosure and if he wilfully conceals anything essential or gives false evidence, he would have failed to comply with the conditions on which the pardon was granted to him. The obligation to make a full and true disclosure would arise whenever the approver is lawfully called upon to give evidence touching the matter; it may be in the committing Court or it may be in the Sessions Court. Neither as a matter of reason or logic nor as a matter of statutory interpretation can it be said that section 339 (1) of the Criminal Procedure Code is dependent on or connected with section 337 (2) in the sense that the approver must be examined both in the committing Court and the Sessions Court before it can be held that he has forfeited his pardon. It is sufficient if he fails to conform to the conditions on which the pardon has been granted to him at either stage.

Case-law discussed.

Queen-Empress v. *Ramaswami*, (1901) I.L.R. 24 Mad. 321, referred and followed.

Appeal against the Order of the Additional Sessions Judge of the Court of Session of the Coimbatore Division, in Case No. 61 of the Calendar for 1957, dated 15th July, 1957.

G. Gopalaswami and *V. Gopinath*, for Appellant.

V. V. Radhakrishnan, for the Public Prosecutor (*P. S. Kailasam*) on behalf of the State.

The appeal came on for hearing before Somasundaram, J., who made the following

ORDER.†—This is an appeal against the conviction of the appellant by the Additional Sessions Judge of Coimbatore in S.C. No. 61 of 1957. In S.C. No. 220 of 1956, eight accused were tried for the murder of one Kolandaiappa Goundan. The appellant herein was one of the persons implicated in that case; he gave a confessional statement, Exhibit P-2. This induced the prosecution to tender pardon to him and take him as an approver. But, in the committal Court, when he was put in the witness-box, he retracted from the confessional statement, Exhibit P-2, and turned hostile to the prosecution. Thereafter, he was not examined in the Sessions Court as a witness. The trial of the accuseed went on with the other witnesses, and finally resulted in the acquittal of the accused by this Court.

After the disposal of S.C. No. 220 of 1956 on 4th February, 1957, the Public Prosecutor, Coimbatore, gave a certificate under section 339, Criminal Procedure

* Cr. A. No. 504 of 1957. · 12th November, 1958. (21st Kartika, 1880—Saka).

† 5th November, 1958.

Code, Exhibit P-30, dated 10th March, 1957. It says that this accused who accepted the conditions of pardon tendered to him by the learned District Magistrate, Coimbatore, did not comply with the conditions and that this was a deliberate and wilful conduct on his part. It further states that he had concealed all essential particulars and it was therefore requested that the accused might be committed to the Sessions. Therefore, this accused, after the usual preliminary enquiry, was committed to Sessions ; and in the Sessions, he has been convicted by the Sessions Judge.

The point of law that is raised before me by Mr. G. Gopalaswami appearing for the appellant is this. Under section 337 (2), Criminal Procedure Code, every person accepting a tender under this section shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any. Under section 339 (1), where a pardon has been tendered under section 337 or section 338, and the Public Prosecutor certifies that in his opinion any person who has accepted such tender has, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made, such person may be tried for the offence in respect of which the pardon was so tendered, or, for any other offence....provided that such person shall not be tried jointly with any of the other accused and that he shall be entitled to plead at such trial that he has complied with the conditions on which such tender was made, in which case it will be for the prosecution to prove that such conditions have not been complied with. The contention of Mr. Gopalaswami is that, though the witness might have turned hostile in the committing Magistrate's Court, still, if he is put in the Sessions Court, he is likely to revert to truth and speak the truth in the Sessions Court. The second contention is that under clause (2) of section 337, there is an obligation to examine him not only in the Court of the Magistrate but also in the subsequent trial, if any. It is only after complying with the conditions of clause (2), that is, when there is a trial and after the accused is examined in the trial, that the certificate should issue and he should be tried for not complying with the conditions of the pardon. In *Queen-Empress* v. *Ramaswami*[1], a Bench of this Court has held that it is not necessary to examine the approver in the Sessions Court, and that, if the approver had shown an inclination to retract from the confessional statement even in the committal Court, that is, sufficient circumstance, and without his further being examined in the Sessions Court, he could be prosecuted under section 339. But this section has been amended in 1923. Before the amendment, section 337 (2) provided that the person accepting a tender of pardon should be examined as a witness in the 'case'. The present amendment is that the witness should be examined in the committal Court and in the trial, if any. The decision in *Queen-Empress* v. *Ramaswami*[1], relates to the section as it then stood, namely, that he should be examined in the case. Benson, J., who delivered the judgment of the Bench, with which Davies, J., concurred, held as follows :

" The words ' in the case ' are purposely used so as to include the preliminary enquiry and do not refer to the trial only. There are many cases in which there would be no need to examine the approver as a witness before the Court of Sessions, *e.g.*, where the Magistrate discharges the accused, or where the accused dies before the trial, or where the accused pleads guilty before the Sessions Court and is convicted on the plea. Could it be held that if the approver in these cases, when examined at the preliminary enquiry, kept back material evidence within his knowledge, the pardon could not be withdrawn, and that the witness must go scot-free, though guilty of the offence of which he had been pardoned on condition of making a full disclosure ? I can see no reason for such a conclusion."

Referring to the opinion of the Sessions Judge that the man should have been given an opportunity of earning his pardon in the Sessions Court, the Bench further observed as follows at page 324 :

" I do not think that this view is correct. The man having failed to comply with the conditions of his pardon when examined on oath before the Magistrate, there was no reason for the prosecution to think that he would give other evidence before the Sessions Court, There was, in my judgment, no reason why the prosecution should, in the Sessions Court, put forward as a witness for the prosecution a man who they had every reason to think would give false evidence. He was bound over and was available for examination if the Court or the accused wished to examine him, but I do not think there was any duty on the prosecution to examine him. Even if he were examined in the Sessions

1. (1901) I.L.R. 24 Mad. 321.

Court and gave the evidence originally expected from him when pardoned, his evidence would be of little or no value in consequence of his previous contradictory evidence before the Magistrate. In fact, if the prosecution was bound to follow the course proposed by the Sessions Judge, the provisions of the law which aim at securing convictions by the grant of pardons would become nugatory, for the approver could always save himself without materially assisting the prosecution. It would only be necessary for him to give false evidence before the Magistrate, and reserve the truth for the Sessions Court. The latter would ' earn his pardon,' while the former would deprive the latter of any weight it might otherwise have in favour of the prosecution. When a pardon has been tendered and has been accepted, the utmost good faith must be kept on both sides. Good faith is broken if the witness does not disclose the truth to the Magistrate, and, in my opinion, the conditional pardon may be at once withdrawn as soon as good faith has been broken."

This is a decision of a Bench of this Court. They hold on the section, as it then stood, that it is not necessary to examine the approver in the Sessions Court. Ordinarily, this decision is binding on me. But there is a charge in the wording of the section. Instead of saying "in the case", the section now says that he shall be examined in the subsequent trial, if any. It certainly contemplates the case of discharge or death of the accused under the circumstances mentioned in the above case. But, the words " in the subsequent trial, if any " mean that when there is a trial, as in this case there was undoubtedly a trial, the section casts an obligation to examine him as a witness in the trial. That has not been done in this case. The question as to whether the prosecution is bound to examine a witness who has turned hostile in the committing Court itself does not arise in this case. It may properly arise if comment is made upon the fact that the particular witness has not been examined, and the explanation of the prosecution was that he has turned hostile in the committing Court would be a satisfactory explanation. But, in this case, as the appellant has been prosecuted as he has gone back on the conditions, the question arises whether he should not have been examined in the Sessions Court as well, before action is taken against him for trying him before the certificate is given under section 339. This is a question of some importance as it is likley to occur in many cases where the approver who is tendered a pardon may go back on his statement, whether he should be examined in the Sessions Court before prosecuting him for the offence, to which he confesses in his confessional statement. I would therefore direct this case to be posted before a Bench.

The appeal came on for hearing before a Bench (*Rajagopalan and Balakrishna Ayyar, JJ.*).

G. Gopalaswami and *M. Gopinathan*, for Appellant.

The Public Prosecutor on behalf of the State.

The Judgment of the Court was delivered by

Balakrishna Ayyar, J.—The Additional Sessions Judge, Coimbatore, has convicted the appellant under section 363, Indian Penal Code, read with section 109, Indian Penal Code, and sentenced him to undergo rigorous imprisonment for three years.

The case for the prosecution, so far as it is now material, may be summarised extremely briefly. One Kolandaiappa Goundar of Narasapuram village had incurred the enmity of a number of his castemen in his village. So he left Narasapuram and took up residence in the house of his sister Devakkal, P.W. 23 in Gandhipuram. But his enemies were resolved to take his life. So they arranged that he should be persuaded to attend a late cinema show so that on his way back he could be murdered at some suitable spot. For some reason or other two such schemes miscarried.

Some time in the evening of 26th August, 1956, the deceased went to inspect a plot of land which he intended to purchase. One Nanjappa accompanied the deceased. Immediately before he set out in company with the deceased, Nanjappa asked P.W. 2 to go and inform the appellant that he was taking the deceased to a place that he had already shown to the Goundars. Accordingly P.W. 2 met the appellant and told him that the deceased had already been taken to the spot shown to the Goundars and asked him to inform the Goundars accordingly. The evidence in the case does not show what happened immediately thereafter.

About 9 A.M. on 27th August, 1956, P.W. 4, the Talayari of Sanganoor village saw the headless body of a man lying on the cart track between Sanganoor and Nallampalayam villages. He reported this to P.W. 5 the Village Munsif who in his

turn sent the usual reports to the Magistrate and the police. The body was subsequently identified as that of the deceased Kolandaiappan by its finger prints which tallied with those on a sale deed which the deceased had executed some time before.

On 3rd September, 1956, P.W. 24, the Circle Inspector, Crime Branch, Coimbatore, arrested P.W. 2. At 6 P.M. on 4th September, 1956, the Circle Inspector arrested the appellant and questioned him. On 7th September, 1956, P.W. 9 who was then the Sub-Magistrate of Palladam, recorded a confession statement, Exhibit P-2 from the appellant. Some time thereafter a pardon was tendered to the appellant on the usual terms, which he accepted. In due course a charge-sheet under sections 302, 364, 201 and 120-B, Indian Penal Code, was laid against Nanjappa Mudali, Kaliappa Nadar and six others. The learned Sessions Judge acquitted accused 6, 7 and 8 before him and convicted the remaining five. On appeal to this Court these five persons were also acquitted. At the preliminary enquiry before the committing Magistrate in the case against these eight persons the appellant was examined as a witness. He then went back completely on the earlier confessional statement which he had made to the Sub-Magistrate of Palladam, P.W. 9 *vide* Exhibit P-25. In view of this fact the appellant was not examined in the Sessions Court at the trial of Nanjappa Mudali and others.

On 10th March, 1957, the Public Prosecutor, Coimbatore, filed a certificate under section 339, Criminal Procedure Code, to the effect that the appellant had not complied with the conditions on which a pardon had been tendered to him. Thereupon the appellant was placed on his trial for his part in the murder of Kolandaiappa Goundar. The learned Additional Sessions Judge framed two charges against him. The first was that on or about 26th August, 1956, the appellant had

"abetted the commission of the offence of abducting Kolandaiappa Goundan by Nanjappa Mudali and Kaliappa Nadar *alias* Periathambi in order to murder him, which act was committed in consequence of"

his abetment—an offence punishable under sections 364 and 109, Indian Penal Code. The second charge was under section 302, Indian Penal Code and section 109, Indian Penal Code. The learned Additional Sessions Judge acquitted the appellant on the second charge and convicted and sentenced him on the first charge but under section 363, Indian Penal Code, as has already been mentioned.

Before the Additional Sessions Judge the appellant pleaded that he had complied with the conditions on which a pardon had been tendered to him. He also took the point that he had not been examined as a witness in the Sessions Court. The Additional Sessions Judge found that the appellant had not complied with the terms on which a pardon had been tendered to him. He also held that the omission to examine him in the Sessions Court did not bar his trial.

The appeal which the prisoner filed came on for hearing before Somasundaram, J. Before him the point was taken that sub-section (2) of section 337, Criminal Procedure Code, directs that every person who has accepted a pardon shall be examined as a witness both in the Court of the committing Magistrate and at the subsequent trial, if any, and that as the appellant had not been examined at the "subsequent trial" his conviction was bad. It was urged before him that the language of sub-section (2) of section 337, Criminal Procedure Code, had been amended in 1923 and that therefore the earlier decisions under that section required re-examination. In view of the importance of the point raised Somasundaram, J., has referred the entire case to a Bench. That is how the matter comes before us.

Before its amendment in 1923, section 337 (2) ran as follows :

"Every person accepting a tender under this section shall be examined as a witness in *the case*."

The Amending Act of 1923 deleted the words "the case" occurring in the sub-section and substituted the following words :

"the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any".

We have now to consider whether the change thus introduced in any way alters the principles that underlay the earlier decisions given by this Court on this sub-section.

The earliest of these is reported in *Queen-Empress* v. *Ramaswami*[1]. The facts of that case were as follows : One Ramaswami was originally charged by the police with being one of a band of dacoits who had committed a crime on 3rd February, 1900. On 16th February, 1900, he made a confessional statement to the Stationary Sub-Magistrate of Trivellore. A pardon was tendered to him which he accepted. On 7th March, 1900, he was examined as P.W. 5 at the preliminary enquiry before the Magistrate. Ramaswami then retracted his former statement and protested that he knew nothing of the crime. In consequence of this he was not put into the witness box in the Sessions Court. Thereafter the pardon that had been tendered to Ramaswami was revoked, and, after that Ramaswami was charged with the original offence of having been one of the dacoits. The Sub-Magistrate committed him to the Court of Session.

The Sessions Judge, however, considered the commitment illegal on two grounds. One was that Ramaswami had not been examined in the Court of Session. A Bench of this Court held that this view was not correct. Benson, J., who delivered the judgment of the Court observed :

" I think the words "in the case" are purposely used so as to include the preliminary enquiry and do not refer to the trial only.

. . . . .

Could it be held that if the approver in these cases, when examined at the preliminary enquiry " kept back material evidence within his knowledge, the pardon could not be withdrawn, and that the witness must go scot-free though guilty of the offences of which he had been pardoned on condition of making a full disclosure ? I can see no reason for such a conclusion.

. . . . .

Moreover, in the present case the man was sent up as a witness to the Sessions Court and was available as a witness though not, in fact, examined by either side. On the other hand in *Queen Empress* v. *Brij Narain Man*[2], the Court clearly was of opinion that failure on the part of the approver to fulfil the conditions of the pardon when examined at the preliminary enquiry before the Magistrate was a sufficient reason for at once revoking the sanction and committing the witness to stand his trial for the offence originally charged against him.

. . . . .

The Sessions Judge is of opinion that the man should have been given an opportunity of earning his pardon in the Sessions Court, and says that, if he had, he might, in that Court, have complied with the conditions on which pardon was granted. I do not think that this view is correct.

. . . . .

Even if he were examined in the Sessions Court and gave the evidence originally expected from him when pardoned, his evidence would be of little or no value in consequence of his previous contradictory evidence before the Magistrate. In fact, if the prosecution was bound to follow the course proposed by the Sessions Judge, the provisions of the law which aim at securing convictions by the grant of pardons would become nugatory for the approver could always save himself without materially assisting the prosecution.

. . . . .

When a pardon has been tendered and has been accepted, the utmost good faith must be kept on both sides. Good faith is broken if the witness does not disclose the truth to the Magistrate, and, in my opinion, the conditional pardon may be at once withdrawn as soon as good faith has been broken."

Davies, J., concurred.

In *Kullan* v. *Emperor*[3], the view expressed in the earlier case was affirmed. The Court observed :

"In this connection, however, we desire to express our concurrence with the remarks of Benson, J., in *Queen Empress* v. *Ramaswami*[1], that the transaction is one of the utmost good faith, and that the

1. (1901) I.L.R. 24 Mad. 321.
2. (1898) I.L.R. 20 All. 529.
3. (1908) I.L.R. 32 Mad. 173.

approver commits breach of the condition if he fails to make a full and true disclosure throughout. It is not enough for him to make such disclosure before the Committing Magistrate if he withdraws it in the Sessions Court or to make it when examined in chief if he withdraws it in cross-examination."

In *Alagirswami Naicken* v. *Emperor*[1], the earlier views of this Court were re-affirmed in these terms :

"It has nowhere been laid down that if a witness first makes a full and true disclosure he is then at liberty to contradict his statement or deny its truth without any fear of forfeiting his pardon. Such an interpretation of section 339 would, we think, be unreasonable, and would render nugatory the provisions of the law which aim at obtaining true evidence of offences by the grant of pardons to accomplices."

After section 337 (2), Criminal Procedure Code, was amended in 1923 the same question, whether the omission to examine an approver before the Sessions Judge bars his subsequent trial in those cases where he had failed to comply with the terms of the pardon came up for consideration before the Lahore High Court in *Ram Nath* v. *The Crown*[2]. The Court observed :

"So far as Mr. Puri's second argument is concerned, namely, that the conditional pardon granted to the approver is a bar to the present trial as he was not examined before the Sessions Judge, I am of opinion that that argument cannot be sustained.

. . . . .

The amendment in the Act appears to have been introduced for the purpose of making it clear that the approver must be examined both in the Court of the Committing Magistrate and in the subsequent trial. Whether non-compliance with this statutory provision renders trials of the persons against whom the approver's evidence is to be tendered illegal, is a question which need not be decided here as those persons have been acquitted. But when it comes to the trial of the approver himself for the offence in respect of which the pardon was tendered, I do not think that the fact that he has not been examined at the trial of the persons he has implicated is a breach on the part of the Crown of the conditions upon which the disclosure was made and the pardon granted. The approver has failed to comply with the condition on which a tender of pardon was made as soon as it is established that his disclosure is not a true and full one, and that it is not a true and full disclosure becomes apparent as soon as he is shown to have made a statement entirely inconsistent with the one upon the strength of which the pardon was granted."

The decision in *Mahla* v. *The Crown*[3], to which we were referred during the course of the arguments throws no light on the present question. What was decided there was that the omission to examine the approver at the Sessions Court vitiated the trial of the persons who were being tried before the Sessions Court. The decision was :

"The fact, however, that an approver appears to the Court to be an untrustworthy witness does not absolve the Court from complying with the statutory provisions."

What the position is of an approver who has failed to comply with the terms on which a pardon was granted to him was not considered there.

The case in *Emperor* v. *Shahdino Dheniparto*[4], may be regarded as lending some support to the contentions of Mr. Gopalaswami, the learned advocate for the appellant. The facts in that case were as follows. On 19th July, 1936, a number of persons formed an unlawful assembly, committed house trespass and abducted a woman. On 7th August, 1936, the District Magistrate tendered a pardon to one of the accused named Shahdino. On 12th September, 1936, this man was examined as a witness in the Court of the committing Magistrate. In his evidence he denied all knowledge of the offence. He was then sent back to the sub-jail in which the other accused were lodged. On 27th October, 1936, Shahdino applied through his advocate asking that the Magistrate should recall him and re-examine him explaining that on 12th September, 1936, he gave the evidence he did because of his fear of the other accused who were in the same sub-jail. He also prayed that he be kept in custody in some other place. On 23rd December, 1936, the Magistrate discharged some of the accused and committed ten others to the Sessions Court. Shahdino was examined as a witness in the Sessions Court and then he made a full and true disclosure of all the facts relating to the offences. The Sessions Judge, however, took the view that the evidence of Shahdino was practically worthless. Subsequently Shahdino was prosecu-

1. (1910) I.L.R. 33 Mad. 514.
2. (1928) I.L.R. 9 Lah. 608.
3. (1930) I.L.R. 11 Lah. 230.
4. A.I.R. 1940 Sind 114.

ted for the part attributed to him in the original offence of unlawful assembly and abduction. Shahdino pleaded that the prosecution was barred under section 339, Criminal Procedure Code, since he had complied with the conditions upon which the pardon was tendered to him. The Additional Sessions Judge accepted the plea and acquitted him. The Government appealed. The Court observed :

> " But we think that when the evidence given by the approver in the Sessions Court was in accordance with the conditions of his pardon, and was evidence upon which, in the circumstances as now disclosed, reliance might very well have been placed, then the fact that in the committing Magistrate's Court the approver gave false evidence should not necessarily be taken to be non-compliance with the conditions of pardon."

It must be pointed out that the facts in that case were somewhat peculiar. Shahdino made a confession to the Magistrate. When he was placed in the box before the committing Magistrate he retracted his earlier statements. That was apparently because he had been frightened by the other accused who were detained in the same sub-jail. As soon as practicable thereafter he made a representation to that effect to the Magistrate who thereupon had him removed to another place. In the Sessions Court he fully adhered to his original statement. Therefore, when he retracted his statement in the committing Court, he did so out of fear. The High Court also took the view that it was in the Sessions Court that the approver had his main duty to perform and that, in the circumstances of the case, it considered that Shahdino had substantially complied with the terms of the pardon tendered to him. That being so it will not be right to treat this case as an authority for the proposition that an approver will have earned his pardon if he adheres to his story in the Sessions Court, and that if he is denied the opportunity of doing so by his not being examined in that Court, it cannot be said that he has failed to comply with the terms on which the pardon was tendered to him. We do not consider that the learned Judges in that case intended to rule that it is sufficient for an approver to adhere to his story at one stage of the proceedings.

Let us examine the reason of the matter. Occasionally when grave offences are committed the law finds it necessary to enlist the assistance of some of the offenders in order that the rest may be brought to justice. This happens when one of several persons who have committed a crime makes a confession which is believed to be true and which it is considered would help to secure a conviction of the rest. The Procedure Code now insists that accomplices who have been tendered a pardon must be examined both in the committing Court and in the Court of Sessions. This provision is inserted in the interests of justice and is not intended for the benefit of the approver. Its purpose is to ensure that all the evidence obtained from the accomplice is placed before the Court so that justice may be done as between the State and the persons placed on their trial. It is not an ordeal through which an approver has to pass before he can win to safety. So far as the approver is concerned, he is given a pardon

> " on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof."

The condition of the pardon is that he must make a full and true disclosure, and, if he wilfully conceals anything essential or gives false evidence, he would have failed to comply with the conditions on which the pardon was granted to him. The obligation to make a full and true disclosure would arise whenever the approver is lawfully called upon to give evidence touching the matter; it may be in the committing Court, or, it may be in the Sessions Court. But, the obligation to make a full and true disclosure rests on the approver at every stage at which he can be lawfully required to give evidence. If at any stage he either wilfully conceals material particulars or gives false evidence he would have failed to comply with the conditions on which the pardon was tendered to him and thereby incurred its forfeiture. Neither as a matter of reason or logic, nor as a matter of statutory interpretation can it be said that section 339 (1) is dependent on or connected with section 337 (2) in the sense that the approver must be examined both in the committing Court and the Sessions Court before it can be held that he has forfeited his pardon. It is sufficient if he fails to con-

form to the conditions on which the pardon has been granted to him at either stage. As explained in the earliest of the cases we have referred to where a pardon has been tendered and accepted, the utmost good faith must be kept on both sides.

The amendment made in the section in 1923 does not affect the correctness of the reasoning of the earlier decisions of this Court. In our opinion they still continue to be good law.

The preliminary objections being out of the way, it is now possible to go into the merits of the case. We have already stated that the learned Additional Sessions Judge has acquitted the appellant on the charge of abetment of murder under sections 302 and 109, Indian Penal Code. It is, therefore, sufficient to examine the evidence bearing on the first charge, *viz.*, the abetment of the offence of abduction in order to murder. We would recall that the abetment is supposed to have taken place in the afternoon or evening of 26th August, 1956. To show that the appellant abetted this abduction there is practically no evidence. P.W. 2 does not say that the appellant induced the deceased person to go anywhere or to do anything. According to P.W. 2 all that the appellant did at that stage was to take a message from P.W. 2 to the Goundars to the effect that the deceased was at the spot that had been agreed on. To take a message from one confederate to another may amount to conspiracy. It may also amount to abetment of murder. But, how it can amount to abetment of the offence of abduction it is hard to see. So far as the confession which the appellant himself made, there is nothing in it to show that he abetted the offence of abduction of Kolandaiappa Goundar. All that he confessed to having done at that stage of the case was to have taken the message from P.W. 2 to the Goundars. The evidence of P.W. 16 only shows that on 26th August, 1956, the appellant visited his tea shop once in the morning and again in the afternoon, and spent some considerable time there. In the afternoon when the appellant was waiting in the tea shop P.W. 2 met him here. Thereafter the appellant went away.

P.W. 22, a son of the deceased merely stated that he saw the appellant sitting in the tea shop of P.W. 16 about the time his father went away in the company of Nanjappa Mudali and another person. Some time later he noticed that the appellant was talking to P.W. 2. Thereafter the appellant went away in a bus. That is all the evidence we have been shown relating to the abduction.

The learned Additional Sessions Judge recorded his conclusion on the evidence as follows :

"Therefore if that version is accepted, the confessional statement only goes to show that the accused abetted the decoying of the deceased in the evening of Sunday, but there is nothing in Exhibit P-2 to show that he abetted the decoying with the intention of causing the murder of the deceased. Thus on a careful and anxious consideration of the whole evidence and the confessional statement of the accused, I come to the conclusion that the accused abetted the decoying of the deceased at about 4 P.M. on Sunday the day of occurrence and that there is practically no evidence to show that it was with the intention of murdering the deceased that the accused so abetted the decoying".

It was in this view that he convicted the appellant under sections 363 and 109, Indian Penal Code. Now, section 363 can have no application whatever to a case of this kind. That section deals with kidnapping any person from India or from lawful guardianship. Kolandaiappa Goundar, the deceased, was certainly not a minor to be kidnapped from lawful guardianship ; nor was it anybody's case that he was kidnapped from India. Apart from the elements of force or fraud that may be involved in abduction and which elements may attract punishment under other sections of the Code abduction *per se* of an adult person is not punishable under the Code. Section 364, Indian Penal Code, deals with cases of kidnapping or abduction in order that the person may be murdered or may be so disposed of as to be put in danger of being murdered. Section 365, Indian Penal Code, deals with kidnapping or abduction with intent to cause that person to be secretly and wrongful confined. Section 366, Indian Penal Code, deals with the kidnapping or abduction of a woman, in order that one or other of the various offences enumerated in that section may be committed against her. Section 367 deals with the kidnapping or abduction of a person that he may be subjected to grievous hurt, slavery, etc. Section 369, Indian

Penal Code, deals with the kidnapping or abduction of children under ten years of age.

The position, therefore, comes to this. The evidence does not support the finding of the learned Additional Sesssions Judge ; and his findings cannot support the conviction.

In the result, the appeal is allowed and the appellant is acquitted and ordered to be set at liberty forthwith unless he be otherwise lawfully detained.

V.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

Papanasam Labour Union, by Secretary, V. Muthiah .. *Petitioner**

v.

State of Madras, by Secretary Industries, Labour and Co-operation, and another .. *Respondents.*

Industrial Disputes Act (XIV of 1947), *sections* 10 (1), *and* 12 (5)—*Reference of disputes for adjudication—Discretion of the appropriate Government—Reference of some items of disputes only mentioned in the strike notice.*

If under section 12 (5) of the Industrial Disputes Act the Government have a large measure of discretion to make a reference for adjudication and if under the Proviso to section 10 (1) too they have a measure of discretion, though a very much narrower one, it follows that the word 'may' in section 10 (1) cannot be construed as equivalent to 'shall'.

Where the requirements of section 22 (4) of the Act as to the notice of strike are not complied with, then the Proviso to section 10 (1) is inapplicable. The matter will have to be considered under section 12 (5) or 10 (1).

Whether section 12 (5) or 10 (1) applies, the Government have a discretion to refer some items mentioned in the strike notice and decline to refer the others, where each of these items of disputes constitute a separate industrial dispute.

S. W. Union v. *State of Bihar,* A.I.R. 1952 Pat. 210, referred.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the first respondent to refer all the seven matters comprised in the strike notice in the dispute and in paragraphs 1 to 7 of the Memorandum Exhibit "B" in accordance with the Proviso to section 10 (1) of the Industrial disputes Act.

A. Ramachandran for *Messrs. Row & Reddi* and *S. Viswanathan,* for Petitioner.

The Additional Government Pleader (*K. Veeraswami*), for 1st Respondent.

M. R. Narayanaswami, for 2nd Respondent.

The Court made the following

ORDER.—This is a petition by the Papanasam Labour Union for the issue of a writ of *mandamus* directing the State of Madras to refer all the matters referred to in a strike notice issued by the petitioner to the Madura Mills Co., Ltd., for adjudication under the Industrial Disputes Act.

Most of the workers in the Madura Mills Company Limited belong to one or other of eight unions. The petitioner is one of such unions. The Madura Mills Company Limited is engaged in the production of cotton textiles, and, the cotton textile industry has been declared to be a public utility service for the purposes of the Industrial Disputes Act, 1947. On 3rd May, 1956, the petitioner served notice on the Madura Mills Company Limited that the workers would go on strike unless the following seven demands were conceded :

(1) Bonus of six months basic wages for the year 1955.

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* W.P. No. 1211 of 1956. 5th December, 1958.
(14th Agrahayana 1880—Saka).

(2) Minimum basic wage of unskilled workers to be increased to Rs. 30 per mensem.

(3) Dearness allowance to be raised form three annas to four annas per point of increase in the cost of living index over 100.

(4) To drop the increased work-load proposed by the second respondent.

(5) Introducing of annual increments and gradation in all departments.

(6) Claim for 11 festival holidays with wages annually.

(7) All workers who have put in more than one year of service to be made permanent.

The Madura Mills Company Limited refused to concede any of these demands.

The Commissioner for Labour then took up conciliation proceedings, but, he was unable to bring about any settlement, and, he reported to that effect to the State of Madras on 15th May, 1956.

By an order dated 30th May, 1956, the State of Madras referred only two out of the seven matters comprised in the dispute and the strike notice for adjudication. The State of Madras gave various reasons for declining to refer the remaining five items for adjudication.

The case of the petitioner is that the State of Madras " had.no jurisdiction" to omit any of the matters comprised in the notice of strike from the order of reference for adjudication. The reasons given by the State for not doing so cannot be accepted in law.

In the counter which the Government filed, the point, the significance of which will be presently examined, was taken that there had been no valid notice of strike under section 22 of the Industrial Disputes Act.

"The notice that was issued under section 22 was not in conformity with the provisions of the Act and the Rules and five of the items contained in the notice, assuming the notice to be valid, were frivolously included by the Unions. The Government on a perusal of the Conciliation Officer's report did not consider it necessary to refer all the seven items for adjudication."

The contention of the Government is that they are under no legal obligation to refer all the items in controversy for adjudication ; they have discretion to decide what items they would refer and what items they would not.

The provisions of the Industrial Disputes Act that bear upon the present controversy, are to be found in sections 10, 12 and 22. I quote the portions that are just now material, and, as they stood on the relevant date, *i.e.*, 30th May, 1956, when Government made the reference complained of.

" SECTION 10.—*Reference of disputes to Boards, Courts or Tribunals*.—(1) Where the appropriate Government is of opinion that any industrial dispute exists or is apprehended, it may at any time, by order in writing,—

(*a*) . . . . .

(*b*) . . . . .

(*c*) refer the dispute or any matter appearing to be connected with, or relevant to, the dispute, to a Tribunal for adjudication.

. . . . .

Provided that where the dispute relates to a public utility service and a notice under section 22 has been given, the appropriate Government shall, unless it considers that the notice has been frivolously or vexatiously given or that it would be inexpedient so to do, make a reference under this sub-section notwithstanding that any other proceedings under this Act in respect of the dispute may have commenced.

"SECTION 12 (1).—Where any industrial dispute exists or is apprehended, the conciliation officer may, or where the dispute relates to a public utility service and a notice under section 22 has been given, shall, hold concilation proceedings in the prescribed manner.

. . . .

" (4) If no such settlement is arrived at, the Conciliation Officer shall, as soon as practicable after the close of the investigation, send to the appropriate Government a full report setting forth the steps taken by him for ascertaining the facts and circumstances relating to the dispute and for bringing about a settlement thereof, together with a full statement of such facts and circumstances, and the reasons on account of which, in his opinion, a settlement could not be arrived at.

" (5) If, on a consideration of the report referred to in sub-section (4) the appropriate Government is satisfied that there is a case for reference to a Board, or Tribunal, it may make such reference. Where the appropriate Government does not make such a reference it shall record and communicate to the parties concerned its reasons therefor."

Section 22 (1) directs that no person employed in a public utility service shall go on strike in breach of a contract without giving notice of strike, or within fourteen days of giving such notice, or before the expiry of the date of strike specified in any such notice, or during the pendency of any conciliation proceedings and seven days after the conclusion of those proceedings. Section 22 (4) provides:

" The notice of strike referred to in sub-section (1) shall be given by such number of persons to such person or persons and in such manner as may be prescribed."

It will be noticed at once that the Proviso to section 10 (1) and section 12 (5) are in conflict. The Proviso make it obligatory on Government to make a reference for adjudication provided two conditions are fulfilled. One is that the dispute must relate to a public utility service, and, the other is that a notice of strike or lock-out should have been given in the prescribed manner. When both these conditions are fulfilled, a duty is laid on the Government to make a reference for adjudication except in two situations. .These are: (1) that the appropriate Government considers the notice of strike or lock-out, as the case may be, to be frivolous or vexatious, and (2) that it is inexpedient to make a reference. On the question in what circumstances it would be permissible for the Government to hold that it is inexpedient to make a reference, the statute gives no guidance ; but I take it that the expediency must be based on the general public interest and not the advantage of individuals, groups or parties. Section 12 (5), however, says something materially different. That sub-section does not make it obligatory on the Government to make any reference at all. Even the discretion to refer for adjudication appears to be qualified by the requirement that Government should be satisfied that there is a case for reference to a Board or Tribunal. Where Government decide not to make a reference, all that they are required to do by section 12 (5) is to make a record of their reason and communicate them to the parties concerned.

No amount of ingenuity can bring the Proviso to sections 10 (1) and 12 (5) into apposition. It is one of those instances where the complaint may be properly made that the Legislature does not seem to know its own mind.

This conflict between section 12 (5) and the Proviso to section 10 (1), however, makes it easier to construe the word "may" which occurs in section 10 (1). Ordinarily when power is conferred on any authority and a duty is attached thereto and the word "may" is used in that context, Courts have taken the view that the word "may" is virtually equivalent to the word "shall". It might have been permissible to construe the word "may" occurring in section 10 (1) as equivalent to "shall" but for the proviso. If, under section 12 (5) Government have a large measure of discretion in deciding whether they would make a reference for adjudication or not, and, if under the proviso to section 10 (2) too they have a measure of discretion, though a very much narrower one, it follows that the word "may" in section 10 (1) cannot be construed as equivalent to "shall ".

The same view has been taken in the case reported in *State of Madras* v. *S. M. P. Labour Union*[1]. *Vide* the discussion on pages 621 and 622.

It is common ground that the industry in question has been notified as a public utility service. It was also admitted before me that the requirements of section 22 (4) had not been complied with. The Proviso to section 10 (1) will not, therefore, apply to the present case since before that Proviso can take effect it is necessary

1. (1951) 2 M.L.J. 619.

that a notice in conformity with the requirements of section 22 should have been given. Mr. Ramachandran, the learned advocate, for the petitioner, however, argued that in the present case Government have treated the notice of strike as lawful and they cannot now be heard to say that the notice of strike is not lawful. He said that on prior occasions too Government have taken action on notices of strikes which did not conform to the requirements of section 22.

To dispose of this argument it may perhaps be sufficient to say that if the notice of strike is not legal because it does not conform to the requirements of section 22, Government have no power to make it legal; the Act nowhere gives them the requisite power. Even if in the past Government have taken action on notices of strike which did not conform to the requirements of the Act, that will not have the effect of validating the present notice. The argument of Mr. Ramachandran really amounts to this, that there is an estoppel against Government. But, then it is familiar knowledge that there can be no estoppel against a statute and, even if an estoppel can be raised against Government, I do not see how it can be raised against the Madura Mills Company Limited.

If the Proviso to section 10 (1) is out of the way, then the matter will have to be disposed of under section 12 (5) or under section 10 (1). It will be noticed that under section 12 the appropriate Officer is entitled to initiate conciliation proceedings where any industrial dispute exists or is apprehended. A positive duty to initiate conciliation proceedings is imposed upon him where the dispute relates to a public utility service and a notice under section 22 is given. But, in other cases, though he is under no duty to act, he is given power to act if he thinks fit. Under section 12 (4) the Conciliation Officer is bound to report the result of his efforts to Government whether the dispute relates to a public utility service or not, and, whether a notice of strike has been given or not. Section 12 (5) gives a considerable measure of discretion to Government to refer the dispute for adjudication or not. The only limitation imposed there is that if they refuse to make a reference they must inform the parties concerned why they refuse to do so. If, therefore, the present matter can be treated as falling under section 12 (5), the Government would appear to have complied with the requirements of that sub-section because they informed the parties why they declined to refer the other questions for adjudication.

But some difficulty is raised by the fact that section 10 (1) also applies to the case. Mr. Ramachandran advanced an argument based on the language of section 10 (1) and, it is now necessary to refer to it. In the present case, since there was no proper notice under section 22 Government could have taken the stand that they were not bound to make a reference, and, if they had taken that stand, it may be that they could not have been compelled to make the reference. But then, they decided to make a reference and when they did that, it was not open to them to refer only some items for adjudication and refuse to refer the rest. They were bound to refer the entire dispute or not at all. It was pointed out that the words in section 10 (1) are "refer the dispute" and not any of the points in dispute. It was also pointed out that in 1952 clause (*c*) of sub-section (1) of section 10 was amended by adding the words "any matter appearing to be connected with, or relevant to, the dispute". This suggests that so far as matters outside the dispute proper are concerned, Government have been given the power to pick out any particular matter. It was argued that when Government was given freedom of selection in respect of matters appearing to be connected with the dispute or appearing to be relevant to the dispute, and, no such freedom was given in respect of the dispute itself, they were bound to refer the entire dispute.

This reasoning makes it necessary to consider what the word "dispute" means. In section 2 (*k*) "industrial dispute" is defined as follows;

"'Industrial dispute' means any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person".

The petitioner in the present case made seven demands on the Madura Mills Company, Limited. The first was a claim for bonus, the second was for a minimum basic wage for unskilled workers, the third related to dearness allowance, the fourth related to work-load, the fifth related to annual increments and time-scales of pay, the sixth related to festival holidays, and, the seventh was the claim that persons who had put in one year of service should be made permanent. Every one of these seven items is a separate industrial dispute. In respect of any one of these, the Union could have given a notice of strike on which conciliation proceedings were bound to follow, and, at the end of which, either Proviso to section 10 (1) or 12 (5) would have come into operation. It is not possible to say that all these items are so integrated as to constitute one single industrial dispute. There is point in the contention of M. Narayanaswami, the learned advocate for the Madura Mills Company, Limited, that because all the demands are put down on one sheet of paper, all the disputes do not become one.

This point was considered by a Bench of the Patna High Court in *Members of S. W. Union* v. *State of Bihar*[1].

I quote the relevent passages :

"It was contended by the learned counsel on behalf of the petitioner that the dispute itself comprised the entire list of 44 demands and it was beyond the jurisdiction of the State Government to refer only a part of the dispute, meaning thereby the items specified in Annexure A of the notification. In my opinion the argument of the learned counsel is untenable and cannot prevail.

* * * * *

According to this definition, each demand when made by the Workers' Union and refused by the management gives rise to an 'industrial dispute'. I conceive therefore that 44 demands in the strike notice would give rise not to a single trade dispute but to an aggregate of 44 such disputes. For the reasons that I shall presently State the Government is not legally bound to refer all such disputes under section 10 (1), even if a public utility service is involved and notice of strike under section 22 has been given. It follows that the reference made by the State Government with reference to the four matters mentioned in Annexure A of the notification is *intra vires* and legal ".

With this reasoning I am in respectful agreement.

From this it follows that whether section 12 (5) or 10 (1) whichever it is, is more properly applicable to the facts of this case, Government had a discretion to refer some items in dispute and decline to refer the others, since each of those disputes constituted a separate industrial dispute.

In the result, the petition is dismissed and the rule *nisi* discharged. There will be no order as to costs.

V.S. *Petition dismissed.*

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1. A.I.R. 1952 Pat. 210.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE RAMACHANDRA AYYAR.

Mohammed Ismail Maracair and others .. *Appellants**

v.

Doraisami Mudaliar and others .. *Respondents.*

Civil Procedure Code (*V of* 1908), *Order* 34, *rule* 1—*Scope—Mortgage—Suit on—Parties—Indivisibility of mortgage—Extent of—Suit for mortgage amount by some only of heirs of the mortgagee—Prayer for recovery of shares of plaintiffs alone—Failure to implead remaining heir within time—Joinder after expiry of period of limitation for suit—Effect—Maintainability of suit—Order* 1, *rule* 9—*Limitation Act* (*IX of* 1908), *section* 22—*Effect of.*

A mortgage is one and indivisible in regard to the amount and security, and no suit can be filed to enforce a mortgage which entails the disintegration of either of them. All the mortgagees must be represented in the suit not merely by virtue of Order 34, rule 1, Civil Procedure Code, but by reason of the substantive law and the contract between the parties which renders the mortgage indivisible. Order 1, rule 9, Civil Procedure Code, cannot be applied to save a suit brought by some only of the mortgagees without joining the others, as it is not the right of any co-sharer mortgagee to obtain a decree with respect to his aliquot share of the mortgage money. It is not open to some of the mortgagees to split up the debt without the concurrence of the other mortgagees and of the mortgagor.

The fourth respondent executed a mortgage on 25th February, 1933, in favour of *R*, a Mohamedan lady. She died in 1937, leaving, as her heirs, four sons and a daughter. One of the sons, *M.S.*, was adjudicated an insolvent and his estates vested in the Official Receiver. The appellants, that is, the remaining three sons and the daughter of *R*, filed a suit to recover their share in the mortgage debt, that is, 7/9th share in the mortgage debt, leaving out the share of the insolvent son, *M.S.* But they did not implead either *M.S.* or the Official Receiver as a party to the suit. Respondents 1 to 3 and 5 who claimed to have purchased the interest of the mortgagor objected to the frame of the suit on the ground that the interest of *M.S.* the insolvent son, in the mortgage was not represented in the suit. The appellants thereupon applied to implead the Official Receiver as a party defendant and to amend the plaint. The application was allowed but, on the date of the application, the suit had become barred in regard to the claim of *M.S.* The contesting respondents pleaded that the plaintiffs were not entitled to sue for their share only of the mortgage amount and the suit as a whole was barred by limitation, as a necessary party had been impleaded out of time. The lower Court overruled the objection and passed a preliminary decree.

Held, that the omission to implead the Official Receiver as a party defendant before the expiry of the period of limitation for the suit was fatal to the whole suit, and would result in the dismissal of the suit as the appellants would not completely represent the mortgagee's interests. The suit as laid was incompetent, and having regard to the provisions of section 22, Limitation Act, the addition of the Official Receiver after the period of limitation had expired would not render the suit competent on the date on which it was filed.

Siaram v. *Jugutdeo Singh*, A.I.R. 1952 Pat. 161, dissented from.

Rameshwar Bux v. *Ganga Bux*, A.I.R. 1950 All. 598; *Adiveppa* v. *Rachappa*, I.L.R. (1948) Bom. 158; *Sunitbala Debi* v. *Dara Sundari Debi Chowdhurani*, (1919) 37 M.L.J. 483 : L.R. 46 I.A. 272 : I.L.R., 47 Cal. 175 at 177; *Mati Lal Datta* v. *Bejav Lal Chakrabarti*, I.L.R. (1943) 1 Cal. 59; *Huthasanan Nambudri* v. *Parameswaran Nambudri*, (1898) I.L.R. 22 Mad. 209; *Nagendran Chettiar* v. *Lakshmi Ammal*, (1933) I.L.R. 56 Mad. 846 (F.B.); *Kailasa Iyer* v. *Sundaram Pattar*, (1941) 2 M.L.J. 986 : I.L.R. (1942) Mad. 438; *Peer Ammal* v. *Nalluswami Pillai*, (1937) 2 M.L.J. 666 and *Gopalaswami Aiyar* v. *Nataraja Chettiar*, (1947) 1 M.L.J. 279, referred to.

Appeal under clause 15 of the Letters Patent preferred against the Judgment and Decree of the Hon'ble Mr. Justice Chandra Reddi, dated 12th March, 1954, in A.S. No. 13 of 1950, preferred against the decree of the Court of the Subordinate Judge of Cuddalore in O.S. No. 19 of 1948.

K. S. Desikan, for Appellants.

S. Thyagaraja Ayyar, for Respondents.

The Judgment of the Court was delivered by

Ramachandra Iyer, J.—This is an appeal from the judgment of Chandra Reddi, J., in Appeal No. 13 of 1950, reversing the decree and judgment of the learned Subordinate Judge, Cuddalore, in O.S. No. 19 of 1948. The plaintiffs who

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*L.P. Appeal No. 148 of 1954.

23rd April, 1958.
(3rd Vaisakha, 1880 Saka).

are the appellant here filed a suit on the foot of a mortgage, Exhibit A-1, dated 25th February, 1933, executed by the 4th respondent in favour of one Rokia Bi. Rokia Bi died in 1937, leaving as her heirs four sons and one daughter. One of the sons, Mahomed Sultan, was adjudicated an insolvent in I. P.No. 24 of 1933 on the file of the Sub-Court, Cuddalore, and his estate became vested in the Official Receiver of South Arcot. The appellants who represent the interests of all the heirs of Rokia Bi except Mahomed Sultan filed a suit to recover the mortgage debt in the Sub-Court, Cuddalore. Their claim was only in regard to their 7/9th share in the mortgage. They valued their share of the mortgage amount at Rs. 8,750 and giving up their claim in respect of Rs. 250 filed the suit to recover Rs. 8,500. Unfortunately they did not make either Mahomed Sultan or the Official Receiver, in whom the estate of Mahomed Sultan vested, as party to the suit. Respondents 1 to 3 and 5 claim to have purchased the interests of the mortgagor and the other respondents claim some interest either as alienees of portions or lessees of the hypotheca.

Respondents 1 to 3 and 5 and 6 objected to the frame of the suit in that the interest of Mahomed Sultan in the mortgage was not represented therein. The plaintiffs thereupon filed I.A. No. 524 of 1948 to implead the Official Receiver as party defendant and to amend the plaint. That application was ordered on 14th December, 1948, but it is admitted that on the date when the application was filed the suit had become barred in regard to the claim of Mahomed Sultan. The contesting respondents raised several questions but the most important of them were covered by issues 3 and 6 in the suit. They raised the question whether the plaintiffs were entitled to sue for their share of the mortgage amount alone and whether the suit as a whole was barred by limitation, as a necessary party had been impleaded out of time.

The learned Subordinate Judge held that as the Official Receiver was brought on record the suit was not barred and that the plaintiffs could maintain the suit for their 7/9th share. The learned Judge therefore passed a preliminary mortgage decree. Respondents 1 to 3 filed an appeal against that decree to this Court. Chandra Reddi, J., who heard the appeal held that the omission to implead the Official Receiver as a party defendant before the expiry of twelve years from the date fixed for redemption of the mortgage was fatal to the whole suit and, in that view, he dismissed the suit. The plaintiffs have, therefore, filed the above appeal under clause 15 of the Letters Patent. Mr. K. S. Desikan appearing for the appellants contended that the appellants could maintain the suit to recover their share of the mortgage amount and that the impleading of the Official Receiver after the period of limitation had expired in respect of the claim on the mortgage would not entail a dismissal of the suit in regard to the appellants' claim. He relied in this connection upon a decision of the Patna High Court in *Siaram Singh* v. *Jugutdeo Singh*[1]. In that case one of the two persons entitled to the mortgage money filed a suit to recover his share. The learned Judges held that a decree could be passed for the amount claimed in the absence of the other person interested in the mortgage money. They considered the question only from two points of view, namely, Order 1, rule, 9, Civil Procedure Code, and the hardship to the mortgagor. On the first question they held that as the controversy in the case was only in regard to the actual amount claimed, namely the share of the plaintiff and as the other mortgagee was not interested in the result of the suit, the omission to implead him would not entail the dismissal of the suit, as Order 1, rule 9, Civil Procedure Code, enables the Court to determine the rights of the parties actually before the Court, leaving the rights and interests of others unaffected. They held that the mortgagor would not be affected by the suit as the claim of the other mortgagee was barred by the time the suit came up for hearing and that, therefore, there would be no case of a second suit being filed. We are unable to agree with the learned Judges who decided this case. It is well settled that a mortgage is one and indivisible in regard to the amount and security. In *Huthasanan Nambudri* v. *Parameswaran Nambudri*[2], Subramania Iyer, J., observed as follows :—

1. A.I.R. 1952 Pat. 161. 2. (1898) I.L.R. 22 Mad. 209 at 211.

"The pleader for the respondent urged strongly that the rule entitling a person to redeem the whole in circumstances like the present is opposed to principle in as much as a mortgagee, for whose benefit the rule that a mortgage is indivisible has been introduced, may waive it. But a mortgage for an entire sum is from its very purpose indivisibe; a division of such a mortgage, borrowing the language of a text writer, is conceivable in theory and may be carried out in practice. But in order that a mortgage may fully attain its end of securing satisfaction of the entire obligation in the rank and with the efficacy which the law or the will of the parties determined, it is essential that it should not suffer any disintegration.

This character of indivisibility exists not only with reference to the mortgagee, who may generally be more benefited thereby, but also with reference to the mortgagor. And save as a matter of special arrangement and bargain entered into between of all the persons interested, neither the mortgagor nor the mortgagee, nor persons acquiring through either a partial interest in the subject, can, under the mortgage, get relief except in consonance with the principle of indivisibility referred to."

It is not open to some of the mortgagees to split up the debt without the concurrence of the other mortgagees and the mortgagor. In *Peer Ammal* v. *Nalluswami Pillai*[1], Varadachariar, J., referred to the distinction between the case of a puisne mortgagee and a co-mortgagee and pointed out that while it was open to a puisne mortgagee to bring the hypotheca to sale subject to a prior mortgage, a co-mortgagee cannot sell it subject to the other co-mortgagee's right. The learned Judge observed :

" Further, if it becomes necessary to sell the whole or anything in excess of a proportionate part of the hypotheca to realise even the amount due to the plaintiff-co-mortgagee, it will be neither fair nor consistent with the policy of the law to allow the plaintiff to appropriate the proceeds wholly in satisfaction of his claim. Justice can be done between all the parties concerned only by providing in the decree for the distribution of the sale proceeds amongst the co-mortgagees."

The learned Judge, therefore, was of op'nion that a mortgage was a single cause of action. In *Sunitibala Debi* v. *Dhara Sundari Debi Chowdhurani*[2], it was a case of a single mortgage executed in respect of the same property to secure two sums of money respectively payable to two mortgagees. The Privy Council held that the mortgage clearly effected a conveyance of the real estate to the mortgagees as tenants is common and that it was not a mortgage to each of a divided half but a conveyance to them of the whole property. At page 179, Lord Buckmaster observed :—

" Where a mortgage is made by one mortgagor to two tenants in common, the right of either mortgagee who desires to realise the mortgaged property and obtain payment of the debt, if the consent of the co-mortgagee cannot be obtained, is to add the co-mortgagee as a defendant to the suit and to ask for the proper mortgage decree which would provide for all the necessary accounts and payments, excepting that there could be no judgment for a sum of money entered as between the mortgagee defendant and the mortgagor."

In *Adiveppa* v. *Rachappa*[3], one of the heirs of a mortgagee filed a suit to recover the whole of the mortgage debt by sale of the secured properties without joining the other co-sharers in the mortgage either as plaintiffs or as defendants.

They were added subsequently at a time when the claim in respect of the mortgage had become barred by limitation. The learned Judges held that the suit should be deemed to have been instituted only when all the co-sharers, mortgagees, were impleaded and as by that time the period of limitation had expired, the suit failed. The basis of this decision was that all the mortgagees were to be represented in the suit not merely by virtue of the procedural law, Order 34, rule 1, Civil Procedure Code, but by reason of substantive law and the contract between the parties which rendered the mortgage indivisible. It was held that Order 1, rule 9, Civil Procedure Code, cannot be applied to save such a suit as it is not the right of any co-sharer mortgagee to obtain a decree with respect to his aliquot share of the mortgage money. The principle therefore is that there is indivisibility of the mortgage both in regard to the debt as well as in regard to the security and that no suit can be filed to enforce a mortgage which entails the disintegration of either of them. In the present case there is a further factor to be taken into account. The mortgagees are not joint promisees. The mortgage was originally executed in favour of a single individual, namely, Rokia Bi. The persons claiming the mortgage right

1. (1937) 2 M.L.J. 666.
2. (1919) 37 M.L.J. 483 : L.R. 46 I.A. 272 . I.L.R. 47 Cal. 175 at 177 (P.C.).
3. I.L.R. (1948) Bom. 158.

are the several heirs of that lady who jointly get that right on her death by devolution under the law. That was an indivisible right which the mortgagee, Rokia Bi, had as the sole mortgagee. Therefore the right of this original mortgagee will be represented by all the co-sharers jointly. Even though they were co-owners under the Mahomadan Law, some of them alone cannot represent others and the absence of anyone of them from the array of parties in the suit would render the representation of the mortgagee's right defective.

The principle of the singleness of debt has been accepted in a number of decisions of this and other High Courts. In *Kailasa Iyer* v. *Sundaram Pattar*[1], the question arose as to whether a co-mortgagee can sue for his share of the debt and if so what was the amount of Court-fee that he had to pay. The learned Judges held that one of several co-mortgagees who are in the position of tenants in common could sue to recover his share of the mortgage amount, provided that he made his co-mortgagees defendants if they refused to join him as plaintiffs and he sued for the entire mortgage debt by paying the proper Court-fee thereon. The learned Judges referred to the various cases and held that a decree should be passed in respect of the entire debt and that the plaintiff could not get his share until the mortgagor had paid into Court what he owed under the mortgage or the mortgaged property had been sold under the preliminary decree. The primary claim must therefore be for the enforcement of payment of the entire mortgage debt and, if that were realised, the plaintiff would be paid his share. To the same effect is the decision of the Calcutta High Court in *Mati Lal Datta* v. *Bejav Lal Chakrabarti*[2], where it was held that a co-mortgagee whose share in the mortgage-money is defined or is otherwise ascertainable could maintain a mortgage suit for the share of his dues only if the other co-mortgagees are made defendants in the suit and if in such a suit there was a prayer for taking accounts of the total dues under the mortgage, and for the sale of the whole of mortgaged premises for such dues. On the question of amount of Court-fees to be paid for such a suit, the learned Judges expressed a different view.

We have referred to the decision in *Adiveppa* v. *Rachappa*[3], where it was held that a suit filed at the instance of some of the co-mortgagees without impleading the rest was defective and could not be held to be legally laid. *Rameshwar Bux* v. *Ganga Bux*[4], followed the Bombay Full Bench decision in *Adviеppa* v. *Rachappa*[3]. In *Gopalaswami Ayyar* v. *Nataraja Chettiar*[5], the question arose in a different form. Two of the three mortgagees filed a suit on the foot of the mortgage for recovery of the whole amount, impleading the third mortgagee as one of the defendants. The Court, however, passed a decree only for two thirds share of the amount due to the plaintiffs and directed the other mortgagee to recover his one third share in a separate suit. The mortgaged properties were not sold through Court but were sold privately to the appellant who paid off the decree debt. In a suit by the other mortgagee to recover his share of the mortgage amount, it was held that by reason of the previous decision expressly reserving the right of the defendant mortgagee to proceed with the mortgaged properties, the claim was maintainable. The learned Judges considered the cases on the subject and held that the former decree proceeded upon a defective basis but that in the circumstances of the case the defendant mortgagee's rights were left unaffected. In a recent unreported decision by one of us in S.A. No. 1919 of 1949, it was held that a decree could not be passed for part of the mortgage debt. As pointed out by the learned Judges who decided *Gopalaswami Aiyar* v. *Nataraja Chettiar*[5], the law as to how a suit by one of the several co-mortgagees is to be framed is fairly clear. The suit should be for the entire debt and all the mortgagees should be made parties to the suit. This is based not merely on the principle underlying Order 34, rule 1, Civil Procedure Code, and the principle that the mortgagor should not be harassed by several litigations in respect of the same mortgage, but on the substantive principle of the mortgage law, that the debt as

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1. (1941) 2 M.L.J. 986 : I.L.R. (1942) Mad. 438.
2. I.L.R. (1943) 1 Cal. 59.
3. I.L.R. (1948) Bom. 158.
4. A.I.R. 1950 All. 598.
5. (1947) 1 M.L.J. 279.

well as the security of the mortgage is indivisible. Normally all the mortgagees should join but, if some of them refuse to join, they should be included as defendants. Such mortgagee defendants are not *pro forma* parties but are necessary parties in that the mortgage right vests in them along with the plaintiffs mortgagees. The omission therefore to implead them within the time when the mortgage remains enforceable would result in the dismissal of the suit as the plaintiffs would not completely represent the mortgagees' interests. The learned Judges of the Patna High Court in *Siaram* v. *Jugutdeo Singh*[1], considered the case only from the point of procedural law and of the hardship to the mortgagor. We find that the attention of the learned Judges was not invited to the substantive law regarding the indivisibility of the mortgage. Both on principle and on authority the decision in that case appears to us to require reconsideration. In this connection it is necessary to point out that an omission to implead all the mortgagees either as plaintiffs or as defendants is different from a case where all the persons interested in the equity of redemption are not impleaded as parties. In such a case the omission to implead some of the persons interested in the equity of redemption will not entail the dismissal of the suit as the rights of the parties who are before the Court can be adjudicated leaving the rights of others not made parties to the action unaffected. Vide *Nagenderan Chettiar* v. *Lakshmi Ammal*[2].

We, therefore, agree with Chandra Reddi, J., that the suit as laid was incompetent and that having regard to the provisions of section 22 of the Limitation Act, the addition of the Official Receiver after the period of limitation had expired would not render the suit competent on the date on which it was filed.

The result is that the appeal fails and is dismissed.

P.R.N. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE BALAKRISHNA AYYAR.

S. S. Subbier and S. R. Narasimachari, Proprietors, Sri Kothandaram Spinning Mills and Kothandaram Weaving Mills, Madurai ... *Applicant**

v.

The Commissioner of Excess Profits Tax, Madras .. *Respondent.*

Excess Profits Tax Act (VII of 1940), section 2 (5), Second Proviso—"All business carried on by the same person"—Scope of—Business carried on by several partnership firms with same partners—If business of same person.

Though a business is carried on in the name of a partnership firm the persons carrying on the business are the partners themselves and not the firm. Hence the businesses carried on by the same persons as partners in several firms names will be one business of the partners within the meaning of the second proviso to section 2 (5) of the Excess Profits Tax Act. A partnership unlike a Corporation is not a legal entity and has no corporate existence in the eye of law apart from the partners constituting the firm. Hence it is impossible to treat the same association of person as two different legal entities merely because they carry on business at two different places under different styles and names. The position under the Income-tax Act is different as that Act recognises a partnership as an assessable entity.

Case referred to the High Court by the Income-tax Appellate Tribunal under section 66 (2) of the Indian Income-tax Act, 1922 (Act XI of 1922) in R.A. Nos. 641 and 642 (Madras) of 1951-52 on its file for decision on the following questions of law, *viz.*—

"Whether on the facts and circumstances of the case, the two partnerships entered into on 23rd June, 1944 and 23rd September, 1944, in respect of the Weaving Mills and the Spinning Mills, respectively, constitute one business carried on by the same person within the meaning of section 2 (5) of the Excess Profits Tax Act," in pursuance of the Order of the High Court dated 20th November, 1952, in C.M.P. Nos. 8323 and 8324 of 1952."

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1. A.I.R. 1952 Pat. 161. (F.B.).
2. (1933) 65 M.L.J. 108: I.L.R. 56 Mad. 846

* Case Referred No. 39 of 1954. 3rd September, 1958.

The Advocate General (*V. K. Thiruvenkatachari*), for *K. Srinivasan* and *K. Narayanaswami*, for Applicant.

C. S. Rama Rao Sahib on behalf of the Respondent.

The judgment of the Court was delivered by

Balakrishna Ayyar, J.—Under section 66 (2) of the Indian Income-tax Act read with section 21 of the Excess Profits Tax Act, the Income-tax Appellate Tribunal has referred the following question for the decision of this Court :

"Whether, on the facts and circumstances of the case, the two partnerships entered into on 23rd June, 1944 and 23rd September, 1944, in respect of the weaving mills and the spinning mills, respectively, constitute one business carried on by the same person within the meaning of section 2 (5) of the Excess Profits Tax Act."

The material facts are these: In December, 1934, two brothers named Ramudu Iyer and Subbier started a weaving mill called Sri Kothandaram Weaving Mills. On 19th January, 1938, a deed of partnership relating to this mill and setting out among other things the proportion in which the profits were to be shared was drawn up and executed by the partners. On 4th September, 1941, this deed of partnership was replaced by a fresh one.

In January, 1939, these two brothers jointly started a spinning mill called Sri Kothandaram Spinning Mills. Most of the money required for the erection of the spinning mills came from the Kothandaram Weaving Mills. In March, 1942, a deed of partnership was executed in respect of the spinning mills. Ramudu Iyer died in December, 1943. The partnership was continued between Subbier and Narasimhachari, son of Ramudu Iyer. Two fresh deeds of partnership were executed, one on 23rd June, 1944, in respect of the weaving mills and another on 23rd September, 1944, in respect of the spinning mills.

"In the income-tax assessments for 1941-42 and 1942-43 and the excess profits tax aasessment for the chargeable accounting periods 6th September, 1940 to 12th April, 1941 and 13th April, 1941 to 12th April, 1942, the weaving mills and the spinning mills were held to be separate concerns though they were owned by the same persons, Ramudu Iyer and Subbier. In the course of the income-tax assessment for 1943-44, the income of the two mills was treated as the income of one firm and a single assessment was made. This was upheld on appeal by the Appellate Assistant Commissioner.

The subsequent income-tax assessment for 1944-45 and the excess profits tax assessments for the two chargeable accounting periods ending with 13th April, 1943 and 12th April, 1944, were also made on the combined results of the two businesses."—*Vide* paragraphs 14 and 15 of the letter of reference by the tribunal.

However, on 4th November, 1945, the Income-tax Appellate Tribunal held that the spinning mills and the weaving mills should be separately assessed. The Tribunal recorded the view :

"We find the businesses are governed by the two different deeds and the terms in each of them are different from the other. Thus, we find the very terms of the partnership do indicate that the businesses are separate".

The Appellate Assistant Commissioner applied that decision to the income-tax assessment for the assessment year 1944-45 and to the excess profits tax assessment for the chargeable accounting periods ended 13th April, 1943 and 12th April, 1944.

The appeal which the department took to the Appellate Tribunal was dismissed on 13th December, 1946. In dealing with the excess profits tax assessments, the Tribunal wrote.

"The question, therefore, before us is to determine whether the two businesses (*i.e.*) Kothandaram Weaving Mills and Kothandaram Spinning Mills are being carried on by the same person. Looking at the partnership deed, it is clear to us that the partnership is of one firm between two partners individually whereas the other partnership is between two partners as representatives of their respective Hindu undivided families. In other words, so far as Kothandaram Spinning Mills are concerned, it is a partnership entered into between the two Hindu undivided families through their kartas. It cannot therefore be said that they are carried on by the same persons. We are therefore, not prepared to accede to the argument of the authorised representative of the Department."

For the chargeable accounting periods ended 12th April, 1945 and 31st March, 1946, the Excess Profits Tax Officer amalgamated the income of the two mills. He observed :

"For excess profits tax, the unit of assessment is the business and not the person. . . . In this case, there is no doubt that both the Sri Kothandaram Spinning Mill and the Sri Kothandaram Weaving Mill are carried on by the two persons, Messrs. S. R. Narasimhachari and S. S. Subbier jointly. Hence, whatever may be the position for income-tax, as regards the excess profits tax assessment is concerned, under the second proviso to section 2 (5) of the Excess Profits Tax Act, the two businesses have to be treated as one business for assessment.

As the facts, however, show that both in the Kothandaram Spinning Mills and in the Kothandaram Weaving Mills the partners were the same, *viz.*, the undivided families, represented by the two individuals, S. S. Subbier and S. S. Narasimhachari, I am making this assessment jointly on the two partners combining the profits of the two businesses."

The Appellate Assistant Commissioner confirmed this decision.

On appeal the Tribunal, reversing the conclusion it had reached on 4th November, 1945 and 13th December, 1946, held :

" that the weaving and spinning mills were parts of the same business carried on by the two partners Subbier and Narasimhachari for purposes of section 2 (5) of the Excess Profits Tax Act."

The assessees then came to this Court, and, in accordance with the directions issued to it, the Tribunal, has referred the question quoted above for the determination of the Court.

It is not controverted that the partners who were parties to the deed dated 23rd June, 1944 and to the deed dated 23rd September, 1944, are in both cases the very same persons. The learned Advocate-General who appeared for the assessee contended that notwithstanding the fact, the firm created by the partnership deed of 23rd June, 1944, is different from the firm created by the partnership deed of 23rd September, 1944. He pointed out that though a firm is not a juristic person for all purposes it is an assessable entity under the Indian Income-tax Act. Two persons may enter into a partnership to trade, say in rice in Tanjore. The very same persons may enter into another partnership to trade in cotton seed in Coimbatore. For the purpose of the Indian Income-tax Act the firm in Tanjore would be one entity and the firm in Coimbatore would be another entity. The two would be wholly distinct. It would be only logical and proper to carry this concept into the Excess Profits Tax Act also, and, if we do that, it will have to be held that the Kothandaram Weaving Mills and the Kothandaram Spinning Mills have each to be assessed separately :

In the course of his arguments the learned Advocate-General referred to *Income-tax Commissioners* v. *Gibbs*[1]. The material facts in that case are set out in the second paragraph of the speech of Lord Chancellor:

" The firm of Sir R. W. Garden & Co., at the time when the assessment was made, consisted of four partners who for the present purpose may be designated, A, B, C and D, and this continued to be the composition of the firm on 1st January, 1938, when the first half of the income-tax resulting from the assessment became due. On 7th February, 1938, however, the composition of the firm changed, owing to the taking in of a fifth partner, who may be called E. On 27th July, 1938, the Inspector of Taxes, purporting to act in accordance with rule 9 (1) of Cases I and II of Schedule D certified to the General Commissioners particulars of the change which has taken place and the Commissioner thereupon purported to adjust the assessment by charging to the firm of five persons, out of the total assessment of £69,355, the apportioned amount of £11,078, with the result that the firm of four persons would be relieved of liability for tax on this latter figure, but would be left answerable for tax on the balance of £ 58, 277 ".

The point for determination is set out in paragraph 3 of his speech.

"But though the apportionment is correctly worked out, the respondents have thoughout insisted that no such apportionment under rule 9 could lawfully be made, since, according to them, the change during the year of assessment in the composition of the firm does not constitute a cessor in carrying on the trade by A, B, C and D, and the succession " by another person ", namely, A. B. C, and E in that trade. It is as to the validity of this contention, and as to the proper construction and application of rule 9, that the house has now to pronounce."

The Court of Appeal held that there had been no cesser in the carrying on of the trade by A, B, C and D. In the Court of Appeal Clauson, L.J., had reasoned,

1. (1942) 10 I.T.R. (Supp.) 121 : L.R. (1942) A.C. 402.

"that it is not a partnership firm which carries on trade, but its individual members who carry it on in partnership, and that the old partnership is not to be regarded as ceasing to carry on trade, and the new partnership is not to be regarded as succeeding, when members of the old partnership are also some of the members of the new and thus do not individually cease to carry on the trade at all".

This decision was reversed by the House of Lords. On pages 136 and 137 Lord Macmillan stated as follows :—

" The important thing to ascertain is the meaning of the word ' person ' in the vocabulary of the Income-tax Acts. The word constantly occurs throughout the Acts, and I think that it is most generally used to denote what may be termed an entity of assessment, that is, the possessor or recipient of an income which the Acts require to be separately assessed for tax purposes. Rule 10 provides that " where a trade or profession is carried on by two or more persons jointly the tax in respect thereof shall be computed and stated jointly and in one sum, and shall be separate and distinct from any other tax chargeable on those persons or any of them and a joint assessment shall be made in the partnership name". The profits of a business carried on by a partnership are thus treated as a separate subject of assessment and the assessment is made in the partnership name. The personification of partnerships is even more manifest in Rule 12, by which in certain circumstances a "partnership shall be deemed to reside outside the United Kingdom notwithstanding that some of the members of the said partnership are resident in the United Kingdom." That rule used the expressions " the trade or business of a partnership firm ". "The said firm shall be chargeable", " an assessment may be made on the said firm in respect of the said profit in the name of any partner resident in the United Kingdom". Justification is thus not wanting for the view expressed by Romer, L.J., that for taxing purposes "a partnership firm is treated as an entity distinct from the persons who constitute the firm" (*Watson and Everitt* v. *Blunden*[1]. Having regard to the special vocabulary of the income-tax legislation, I find no difficulty in interpreting the words " a person charged " in Rule 9 to include the case of several persons associated together in partnership for the purpose of carrying on a trade in common whose profits are by the Acts made the subject of separate assessment and separate charge."

Reference was also made to *Jesingbai Ujamshi* v. *Commissioner of Income-tax*[2]. That was a case in which three persons carried on a business in partnership in Ahmedabad in insurance, brokerage, cotton, etc. The very same persons carried on another business in Bhavanagar, and, the question was

" whether these two partnerships constitute two different firms or whether the three partner carry on the same firm and the same business at Ahmedabad and Bhavnagar."

The Court held that they formed two different firms.

The instant case, however, is not one under the Indian Income-tax Act but under the Excess Profits Tax Act. Section 2 (5) of that Act, so far as is material, runs as follows :—

" 'Business' includes any trade, commerce or manufacture . . . .
Provided further that all business to which this Act applies carried on *by the same person* shall be treated as one business for the purposes of this Act."

The question, therefore, is what does the word "person " in this proviso meant. The definition in section 2 (17) of " person " is not helpful since all it says is that

"' Person ' includes a Hindu undivided family".

We have, therefore, to fall back on the General Clauses Act to find out what the word " person " means. Clause (42) of section 3 of that Act gives this definition :

" 'Person' shall include any company or association or body of individuals, whether incorporated or not".

The association of persons who owned the Kothandaram Weaving Mills is the same association of persons who owned the Kothandaram Spinning Mills. Both are, therefore, the same " person ". It is well established that while a corporation is one artificial whole

" with partnerships the case is otherwise ; the members of these do not form a collective whole, distinct from the individuals composing it ; nor are they collectively endowed with any capacity of acquiring rights or incurring obligations. The rights and liabilities of a partnership are the rights and liabilities of the partners and are enforceable by and against them individually ".

See pages 23 and 24 of the Eleventh edition of Lindley on Partnership.

1. 18 Tax Cas., at page 409. 2. (1949) 18 I.T.R. 23 : 52 Bom. L.R. 49.

In *Vissonji Sons & Co.* v. *Commissioner of Income-tax, Bombay*[1] it was observed :

"In law a firm has no existence independently of its partners, and if there are two firms consisting of exactly the same partners, the real position in law is that there is only one firm. It may carry on separate businesses, and may carry on those businesses in different names but in fact there is only one firm in law".

We must, however, mention that this statement of the law was commented on as *obiter* in *Jesingbai Ujamshi* v. *Commissioner of Income-tax*[2].

In the case reported in *Shantikumar Narottam Morarji* v. *Commissioner of Income-tax*[3], the assessee claimed deduction under section 10 (2) of the Indian Income-tax Act and the question that the Court had to consider was whether section 10 had any application to the case of an assessee who is a partner of a registered firm. The contention of the Department and the decision of the Court in respect of that contention will appear from the following passage :

"Mr. Joshi's contention is that section 10 has no application at all because section 10 deals with the profits of a business carried on by the assessee and according to Mr. Joshi the business in this case, is not carried on by the assessee but is carried on by the assessee along with a partner or partners. Mr. Joshi says that a firm under the Indian Income-tax Act is an assessable entity and therefore a distinction must be made between a business carried on by a firm and a business carried on by an individual. Although a firm is an assessable entity under the Indian Income-tax Act a firm is not a legal entity. In the eye of the law a firm is a compendious expression used to indicate that several persons constituting that firm are carrying on a business. But that compendious expression cannot give to the firm a legal entity or a legal existence. In law it is only the partners who exist and who carry on the business. It is equally true that looking to the definition of "partnership" in section 4 of the Partnership Act, when you have a partnership business, the business is carried on by each of the partners, and the definition of a partnership in the Partnership Act has been incorporated in the Indian Income-tax Act in section 2 (6) (*b*). Therefore the contention that section 10 (1) cannot apply to a partner in a registered firm is untenable because he does carry on the business although that business happens to be a partnership business, and therefore if any profits and gains are derived by the assessee from the business carried on by him, those profits and gains must be brought to tax only under this head, *viz.*, the head falling under section 10 (1) which is the head of business."

That decision was followed by a Bench of this Court in *P. M. Muthuraman Chettiar* v. *Commissioner of Income-tax*[4].

From all this it is reasonable to conclude that though a business in carried on in the name of a firm, the persons carrying on the business are the partners themselves and not the firm. The persons carrying on the business within the meaning of the second proviso to section 2 (5) of the Excess Profits Tax Act would, in this view and in the present case, be Subbier and Narasimhachari. No doubt under the Indian Income-tax Act a firm is an assessable entity, but, it acquires that status by virtue of the explicit provisions contained in that Act, and, there are no provisions in the Excess Profits Tax Act justifying the carrying forward of this concept into the latter Act.

The very same question which the learned Advocate-General raised before us has been dealt with in R.C. No. 21 of 1951. The facts there were remarkably similar The members of a Hindu family, six in number, effected a division in status in 1936. A deed of partnership was drawn up, in October, 1938. Thereafter the same members carried on business at two different places under two different names. One business was in Nandyal and the other was in Hindupur. Both the firms were registered under section 26-A of the Income-tax Act and so far as the income-tax was concerned, they were assessed separately. But, for purposes of the Excess Profits Tax Act, the profits of the two business were combined and assessed as a whole. The assessee contended that this was not correct as the two firms were different legal persons and the business must be treated as having been owned by two different entities. This conention was negatived by the Department and also by the Appellate Tribunal. On a reference made to this Court it confirmed the views of the Department and the Tribunal. The Court observed:

"The same association of persons commenced two businesses, one at Nandyal and the other at Hindupur. In other words, the ownership of the two businesses is vested in the same association

1. (1946) 14 I.T.R. 272.
2. (1950) 18 I.T.R. 23 : 52 Bom. L.R. 94.
3. I.L.R. (1955) Bom. 366 : (1954) 27 I.T.R. 69.
4. (1957) 1 M.L.J. 268 : 31 I.T.R. 61.

of persons.... There is only one combination of persons that carried on business both at Nandyal and Hindupur. So long as the partnership is not a legal entity and has no corporate existence in the eye of the law, it is impossible to treat the same association of persons as two different legal entities merely because they were carrying on businesses at two different places under different styles and names".

The Court further explained how the position under the Indian Income-tax Act was different.

The learned Advocate-General did not dispute that this decision being that of a Division Bench of this Court is binding on us. But, he suggested that the matter required reconsideration. We are, however, of the opinion that this decision lays down the law correctly. We see no justification for referring the matter to a Full Bench.

It was next pointed out on behalf of the assessee that in November, 1945 and again in December, 1946, the Tribunal took the view that the businesses were not carried on by the same persons and that it was not justified in reversing its view in respect of another year. No doubt it was not contended that the rule of *res judicata* applied to the Income-tax Appellate Tribunal, but, it was suggested that the principles of *res judicata* should have been respected.

So far as this argument is concerned, it is sufficient to refer to the decision in *The Trustees, Nagore Darga* v. *Commissioner of Income-tax*[1]. At pages 814 to 816 the question is discussed at length and reference is made to the relevant English and Indian decisions. That decision is against the contention of the assessee.

In the result, we would answer the question referred to us in the affirmative and against the assessee. The Department will get its costs. Counsel's fee Rs. 250.

R.M. ——— *Reference answered against the assessee.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BASHEER AHMED SAYEED.

A. S. Mohamed Adam .. *Petitioner**

v.

Managing Trustee, Nagore Darga, and others .. *Respondents.*

Trust—Scheme—Advisory Board under—Member of—Grounds of removal—Power of Court—When to be exercised—Notice to the member—Essential on principles of natural justice.

Nagore Darga is administered under a scheme framed by this Court in A.S. No. 289 and 576 of 1948. The petitioner was a member of the Advisory Board of the Nagore Darga. It has not been provided in the scheme as to how often the Advisory Board should meet and for what purpose. No disqualifications have been provided with regard to the members of the Advisory Board which would make them ineligible to hold office after appointment. On the question of removal of a member for continued absence from the meetings of the Advisory Board :

Held : The principle that the appointing authority generally is vested with the power to remove the appointee for good cause and especially so if the appointee holds office during the pleasure of the appointing authority cannot be questioned.

The Board of Advisors was to function only as a collective body and in an advisory capacity. In the absence of any proof that the Trust had suffered by the absence of the member, or that the member acted in a way prejudicial or detrimental to its interests, the member cannot be removed.

The membership of the Advisory Board, though it may be an advisory one, is certainly a privilege and a right which he is entitled to hold and enjoy and if a member is to be deprived of that right he should be given notice on principles of natural justice.

The proper procedure under the scheme was to start proceedings in the Court by way of a petition only.

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1. (1954) 26 I.T.R. 805.

* C.R.P. No. 880 of 1956. 3rd December, 1956.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the District Court of East Tanjore at Nagapattinam, dated 2nd July, 1956 and made in proceedings No. 2543 of 1956 in O.S. No. 30 of 1946.

C. A. Vaidialingam, Arunachalam, and *Jagannadadas,* for Petitioner.

R. Gopalaswami Ayyangar, S. Thyagaraja Ayyar, K. S. Naidu and *R. Purushotham,* for Respondents.

The Court delivered the following

JUDGMENT.—This revision is against the order of the learned District Judge of Nagapattinam, dated 2nd July, 1956, in District Court Proceedings No. 2543. The order sought to be revised is in the following terms :

"As that member has been continuously absent for the past six months, it may not be desirable to continue his membership any longer. Sri A.K. M. Lasa Maracair is appointed to be a member of the Board in that place."

This order was passed on a report of the Managing Trustee of the Nagore Darga made to the District Judge, Nagapattinam, dated 30th June, 1956. The report is to the effect that the petitioner, A.S.M. Adam, was continuously absenting himself from the meeting of the Advisory Board as detailed therein, that in all he had absented himself on eleven occasions, including the occasions reported by the President of the Advisory Board and that he had left for Malaya. The Managing Trustee also stated that there were no bye-laws relating to such a matter and that, as far as he could ascertain, there was no precedent to guide him, but that in the interests of the institution, it was only just and proper that a person, who had left the place and thus absented himself from meetings continuously, should be held to have forfeited his seat and that a suitable person should be appointed in his place. The Managing Trustee then gave the dates of the meeting from which the petitioner was said to have been absent. There was also a report from the President, Advisory Board of the Nagore Darga, to the District Judge on 17th June, 1956, in which the President stated that the petitioner Janab A.S. Mohammad Adam, B.Com., of the Advisory Board, Nagore Darga, had not come to eight meetings (*i.e.*, for six months) of the advisory Board and that the said person had gone to Siam (Thailand) and that he was informing the Judge of the same.

On receipt of these two reports, the learned District Judge considered these two reports and purported to pass *ex parte* the order already referred to above. Against this order the present petitioner has filed this revision petition on the grounds *inter alia* that the learned District Judge had no power to remove him from the office of being a member of the Advisory Board of the Nagore Darga for mere reasons of absence and that the removal, which amounted practically to a dismissal of the petitioner from his office, was done *ex parte* without notice and that it was opposed to principles of natural justice. It was also contended on behalf of the petitioner that his absence did not in any way affect the management of the trust or its interests for the reason that he was only one of the eleven members of the Advisory Board and that the absence of a single member would not have caused any prejudice to the day-to-day administration of the Nagore Darga Trust, or to the protection of its interests.

It must, at the outset, be stated that this Nagore Darga is administered under a scheme framed by this Court in A.S. Nos. 289 and 576 of 1948. Under the scheme, there is provision for the constitution of a Board of Trustees and also a Board of Advisors. In this petition we are not concerned with the Board of Trustees. The constitution, it functions and all other matters concerning the Board of Trustees are dealt with by the first sixteen clauses of the scheme in question. So far as the Advisory Board is concerned, of which alone the present petitioner was appointed a member, its constitution and functions are governed by clause 17 onwards up to clause 26. Under clause 17, the Advisory Board is to consist of 11 members, three of whom shall be elected by the Nattamaigars from among themselves three elected by the Kasupangudars from among themselves and five nominated by the Court from among the Muhammadan gentlemen residing within the limits of the Nagapatti-

nam Municipality as are neither Nattamaigars nor Kasupangudars, provided that no Nattamaigar shall be entitled to stand for elections as a representative of the Kasupangudars. Clause 18 prescribes the term for which a member of the Advisory Board shall hold office and that is fixed as three years from the date of his election or appointment as the case may be. It also provides for his being eligible for re-election or renomination, as the case may be. Power is given to a member only to resign his office of membership in writing addressed to the Court. There is a transitory provision providing for the Budget Committee functioning as Advisory Board until the formation of the first Advisory Board. Clause 19 provides for the election of one among the members of the Advisory Board, not being the Managing Trustee of the Darga, to hold the office of the President and he is to hold office just for the same period as he may continue to be a member of the Advisory Board, and he may also resign his office by writing addressed to the Court. This clause further provides that in the event of the office of the President of the Advisory Board falling vacant, the seniormost in age among the members of the Advisory Board shall convene a meeting for the election of a new President. Clauses 20 (*a*), (20 (*b*) and 21 prescribe the qualifications, etc., for the Kasupangudars electing a member to the Advisory Board and also how the vacancies are to be filled up in the representatives of the Kasupangudars on the Advisory Board. Clause 22 provides that the meetings of the Advisory Board shall be held in the office of the Darga and that minutes of such meetings shall be recorded by the Manager in a register maintained for the purpose. But there is no provision as to how often such meetings should be held. Clause 23 prescribes that the President shall preside at the meetings of the Board and, in his absence, the seniormost in age among the members present shall preside at such meetings. The same clause provides that decisions shall be by a majority of the members of the Board present and voting and in the event of a tie, the President is given a casting vote or a second vote. Clause 24 prescribes the functions of the Board, *viz.*, to prepare and maintain a list of Kasupangudars entitled to vote at the elections of the Kasupangudars representatives on the Advisory Board, clause 25 gives further powers to the Board to frame rules and bye-laws for the conduct of elections, preparation of the voter's list and all other matters relating to the election of Kasupangudars' representatives, but no power to frame its own rules for the conduct of its own businesses. Under clause 26, the President of the Advisory Board alone is entitled to notice of the appointment of the Manager and to give his opinion about the suitability of the Manager. But the power of appointing the Manager vests in the Managing Trustee. Under clause 36, the President of the Advisory Board, along with the hereditary trustees, is entitled to notice of the contracts and the auctions that might be entered into or held, as the case may be, by the Managing Trustee, and he is entitled under clause 37 to notice of the date and hour of such auctions and such notice should be given at least seven days before the date of auction. Under clause 46, the Advisory Board has the power to appoint every year a certified auditor to audit the accounts of the Darga. Such appointment shall be made out of a panel of four names recommended by the Board of Trustees and the remuneration for the auditor so appointed is to be sanctioned by the Advisory Board.

Among all these provisions of the scheme, it is significant to note that it has not been provided as to how often the Advisory Board should meet and for what purposes. All the more significant is that no disqualifications have been provided for with regard to the members of the Advisory Board which would make them ineligible to hold office after appointment or would disentitle them to be re-appointed as members of the Advisory Board. The Advisory Board is also given power under clause 51 to apply to the Court if the Board of Trustees does not act in accordance with the budget and the Court may pass such orders on such applications as it may deem fit and necessary. There is no specific provision as to what should be done if the Board does not discharge its functions or ceases to exist or becomes defunct for reasons conceivable. The only provision made is that under clause 52 any of the trustees or Kasupangudars or any member of the Advisory Board may by petition apply to the Court for all further orders or directions as may be necessary to car ry out the provisions of the scheme and the Court, shall have full power to give all such directions, as may be

necessary to effectuate and carry out the scheme. Clause 53 provides that if applications are filed for the directions of the Court under the provisions of the scheme by any person, notice of such applications shall be given to the Managing Trustee and the President of the Advisory Board. It is these two provisions that are mainly relied upon by the learned counsel for the respondents. The question is how far these two provisions justify the removal of the petitioner from membership of the Advisory Board.

It is relevant to note at this stage that this petitioner was appointed by the District Judge from among 23 other applicants for the office of the membership of the Advisory Board. At the time this petitioner was appointed to the Advisory Board, he had stated that he was a permanent resident of Nagapattinam Municipality, that he was aged 28 and that his father was doing business in Bangkok and that he was one of the devout worshippers of the Darga. The petitioner is also a B. Com. of the Madras University and a person owning considerable properties in the Nannilam and Nagapattinam taluks. The total value of his assets was shown to be about two lakhs of rupees. At Bangkok also his father was stated to have properties worth two lakhs. He was also a member of the Executive Committee of the Kamalia Muslim League which managed the Kamalia mosque and other institutions at Nagapattinam. After his appointment on the 30th June, 1955, the petitioner left for Bangkok in or about January, 1956. In a letter written in the month of June, 1956, it is stated that the petitioner took leave of the President of the Advisory Board and that he had informed the President that he would be away for about three months. This letter addressed to the President of the Advisory Board also states that after reaching Bangkok, he fell ill and was convalescing and that he expected to leave the place within about 25 days. He expressed the hope that by reason of his absence, the Board had not been handicapped and inconvenienced and he wanted to be excused for his absence. In a certificate issued to him by a doctor of Bangkok, working in the Bangkok Sanatorium and Hospital, on 22nd June, 1956, it is stated that this petitioner had been under the care of the doctor and treatment since May, 1956, and that he had been advised to continue rest for another three to four weeks.

In view of the fact that there was no provision in the scheme decree disqualifying the members of the Advisory Board once appointed from continuing as such for reasons of absence from station and also in view of the fact that no particular duties were to be discharged by the individual members of the Advisory Board except to function as a Board the letter, dated June, 1956, the certificate, dated 22nd June, 1956, do not seem to have been called for at all. Nevertheless, as a demonstration of good manners and conduct and out of a sense of responsibility, the petitioner would appear to have sent this letter and the medical certificate. It transpires that it is only after his letter and certificate that the President of the Advisory Board and the Managing Trustee of the Darga made a report respectively on the 17th June and 30th June, 1946, to the District Judge informing the District Judge about the absence of the petitioner from station and his not attending the meetings of the Advisory Board. These reports are addressed to the District Judge, Nagapattinam, by means of letters. The Managing Trustee reported that the petitioner had left the place and thus absented himself from the meetings continuously and that he should be held to have forfeited his seat and that in his place a suitable person should be appointed by the District Judge. He also said that it was necessary to do so in the interests of the institution. While the President of the Advisory Board had stated that the petitioner had left for Siam, the Managing Trustee had stated that he had left for Malaya. This difference must be due to the wrong information one of them had about his whereabouts. But the significant fact to be noted with regard to these two reports to the District Judge is that they proceeded on the basis that the petitioner had left Nagapattinam once for all and as if he was not going to return to Nagapattinam again, simply because his father had a business at Bangkok and he went to look after that business along with his father, it cannot be presumed that this petitioner left Nagapattinam once for all ; nor could it be inferred that he intended never to return to Nagapattinam so as to be able to exercise the duties and functions that were conferred upon him by the office as a member of the Advisory Board to which he was

appointed some time. The impression given to the learned District Judge that this petitioner had once for all left Nagapattinam and making it appear as if he was not going to return to his permanent place of residence was certainly not quite warranted and was misleading. It was also not proper on the part of the District Judge without making enquiries as to the real situation to have proceeded on the basis that this petitioner had left Nagapattinam once for all, as it appears to be the case from a reading of this order. It is settled law that if a person has a place of residence with an intention to return to that place at any time he chooses, his absence from the permanent place of residence, for whatever long period it might be, cannot be construed to be an abandonment of his intention to return to his permanent place of residence. Unless it was proved by the Managing Trustee or the President of the Advisory Board to the satisfaction of the District Judge that the petitioner, who was appointed a member of the Advisory Board, had decided never to return to India or to Nagapattinam and that his services would no more be available to the Advisory Board, there could have been no justification to consider that this petitioner had forfeited his post on the Advisory Bord, as was suggested by the Managing Trustee of the Nagore Darga. No foundation was laid on any facts before the Judge to enable him to come to a conclusion that the petitioner's place had become vacant.

Apart from this, Mr. Vaidialingam, appearing on behalf of the petitioner, has urged that the District Judge has no power to remove from office a member appointed by him to the Advisory Board in the absence of express powers so given to him under the scheme which is a self-contained one so far as it goes. It is true that in the scheme, as already observed, there is no provision which disqualifies a member of the Advisory Board from holding the office for any reason whatsoever. It was obviously not intended that any disqualification should operate in the case of members who were functioning on a purely honorary basis and in an advisory capacity in a collective manner. Nor is there any provision empowering the appointing authority to remove him from office for any reason. When no provision has been made as to compulsory attendance of these members at meetings of the Advisory Board for any minimum period or number of meetings and when there is no supervening disqualification imposed for non-attendance at the meeting of the Advisory Board, it cannot be considered that non-attendance at meetings of the Advisory Board for any length of period would amount to a forfeiture of the office of the membership of the Advisory Board so as to justify the removal of the member from the Board. A close reading of the clauses referred to above does not give the impression that it was the intention of the scheme that every member of the Advisory Board should attend every meeting of that body and render advice to the Board. Though certain powers are given to the Advisory Board by way of a check against the administration of the trust by the Board of Trustees or by the Managing Trustee or by the Manager himself, still it does not seem to have been within the contemplation of the framers of the scheme that every member of the Board should function continuously as a member and should help the Board both with his advice and actual presence at meetings. It should be remembered that most of the functions that are of an executive nature are assigned only to the President of the Advisory Board. The question in these circumstances arises as to whether it was ever intended by the provisions of this scheme that a member who did not attend any number of meetings of the Board should be considered to have forfeited his office or to have become disqualified to hold office any further so as to entail a removal from office. A reading of the provisions of the scheme does not enable me to come to such a conclusion.

What then is the position when there is no express provision for removal in the scheme? Mr. Gopalaswami Ayyangar, appearing on behalf of the 3rd respondent, contends that the power of the District Judge, the nominating authority, cannot be disputed if he exercises the power of removal of any member of the Advisory Board. That the power of appointment necessarily involves and implies the power of removal, is the principle which is urged by Mr. Gopalaswami Ayyangar, learned counsel for the third respondent. Though there is no express provision in the scheme giving such a power to the District Judge to remove a person already nominated by him to the Advisory Board, still his point is that any person appointed by the Court can also be

removed by that very Court. I think the principle that the appointing authority generally is vested with the power to remove the appointee for good cause and especially so if the appointee holds office during the pleasure of the appointing authority, cannot be questioned. But what one has to consider here is whether in the absence of any provision vesting such power of removal of a member of the Board, the District Judge while exercising such power by implication, has acted properly and with sufficient justification.

In support of his contention Mr. Gopalaswami Ayyangar relied on the provision contained in clause 52 of the scheme which has already been referred to by me in the earlier part of this judgment. Under that clause any of the trustees or Kasupangudars or any member of the Advisory Board may by petition apply to the Court for all further orders or directions as may be necessary to carry out the provisions of the scheme and the Court shall have full power to give all such directions as may be necessary to effectuate and carry out the scheme. Instead of a trustee or any member of the Advisory Board in this case it is the Managing Trustee of the Darga and the President of the Advisory Board that have taken to the notice of the District Judge that the petitioner has been absent and they have asked the District Judge to declare the petitioner to have vacated his office and appoint another person in his place. Mr. Gopalaswami Ayyangar contended that in view of the fact that the petitioner had not been attending the meetings and has not made available, to the rest of the Advisory Board, the benefit of his advice and presence at meetings, the action taken by the Managing Trustee and the President of the Advisory Board should be considered to be in the interests of the administration of the trust and necessitated by considerations of the proper administration of the trust and that it was within the duties of the Managing Trustee and the President of the Advisory Board to keep the District Court informed of the situation and ask for directions. He further urged that the directions asked for by the President of the Advisory Board and the Managing Trustee were only to give effect to the scheme which provided for the appointment of an Advisory Board and for the proper functioning of that Board. But the point to be considered in this connection is whether the absence of this petitioner has been so detrimental to the proper functioning of the Advisory Board or the administration of the trust that it called for his removal and whether the letters written by the Managing Trustee and the President of the Advisory Board were really intended for the purpose of carrying out the provisions of the scheme and whether the orders of the District Judge were necessary to effectuate and to carry out the scheme. It must be remembered that this petitioner was only one of the eleven members of the Advisory Board and it cannot with any justification be argued that the absence of this single member from the meetings of the Advisory Board was really prejudicial or detrimental to the effective and proper carrying out of the scheme by the Advisory Board as provided for in the scheme. It was not the case that by reason of the absence of this petitioner that there was failure of a quorum for any meeting or that the Advisory Board failed to carry out the functions and duties effectively and that by reason of such inability to discharge its functions the administration of the Trust suffered to any extent. It is hardly conceivable that the absence of a single member out of a large body of eleven members would certainly give rise to such undesirable results when there was no quorum fixed for meetings. Considered in that light, it is difficult to agree with Mr. Gopalaswami Ayyangar that the letters written by the Managing Trustee and the President of the Advisory Board were really conceived in the interests of the proper administration of the Trust. The administration had not suffered by any means and there is no proof of that. It could not also be so for the Board was to function only as a collective body and in an advisory capacity.

A technical point has been raised by Mr. Vaidialingam that even if such action was justified under clause 52 on the part of the Managing Trustee and the President of the Advisory Board, the precedure adopted by the two authorities was not competent, for what is contemplated under clause 52 is the procedure of an original petition and not a demi-official letter as the two authorities have conceived it to be. The language seems to be clear that any trustee or any member of the Advisory Board may by petition apply to the Court. This would naturally mean that there must be an

original petition filed for this purpose in the proper manner as recognised by the Procedure Code and not that any action should be taken by the District Court on some letters written to the District Judge. That however, is a technical point. This is only to show the impropriety of the application and also the impropriety of the action taken on such application by the District Judge. Instead of rushing to take action on the letters, the District Judge would have done well in insisting upon the proper procedure, to be followed under clause 52 of the Scheme.

Mr. Gopalaswami Ayyangar next invited my attention to a decision in *Veeraragavachariar* v. *Advocate-General of Madras*[1], to the effect that the procedure provided in clause 52 of the Scheme decree is quite legal and did not offend against section 92, Civil Procedure Code. He rightly contended that the removal of a member of the Advisory Board is not the same as removing a trustee under section 92, Civil Procedure Code. Obviously, a member of the Advisory Board cannot be considered to be a member of the Board of Trustees for the management of the Trust. Section 92 would come into operation only if there is a prayer for the removal of a trustee or for accounting or if there is any charge of breach of trust or even any prayer for modification or alteration of the Scheme. A mere application for the removal of a member of the Advisory Board is not certainly within the purview of section 92, and, therefore, clause 52 of the Scheme decree is certainly not *ultra vires* of section 92, Civil Procedure Code. But this is not the real point that is involved in this petition. Clause 52 may not be illegal nor liable to question under section 92, Civil Procedure Code.

Mr. Gopalaswami Ayyangar next referred me to a decision in *Ram Charan Bajpai* v. *Rakhal Das Mookerjee*[2]. This he relied on for the proposition that a power of appointment ordinarily involves a power of dismissal. In this case, there was a superintendent appointed by the trustees under the power vested in the trustees. It was held that he was a servant of the trustees and that if he was dismissed by them he had no right to an injunction restraining the trustee from interfering with the enjoyment of the rights and privileges of such superintendence as the deed of trust provided. At page 29 the Bench of the Calcutta High Court observed that the power of appointment ordinarily involved a power of dismissal, unless there was anything special in the nature of the office, or the deed or statute under which a person was appointed showed the contrary. As already stated that this is the ordinary position need not be canvassed lest the question involved is quite different. Mr. Gopalaswami Ayyangar also invited my attention to the decision in *Tiruvambala Desikar* v. *Manikkavachaka Desikar*[3]. But this decision does not really help him. I shall advert again to this decision at a later stage in the course of this judgment.

Mr. Gopalaswami Ayyangar's main contention was that if the member of the Advisory Board was not in a position to give his services to the Adviory Board, the Court will not be violating any principles of justice if it should remove him from his place and appoint another instead, that the Court was entitled to take such action in the best interests of the trust, that the protection of the interests of the trust must be paramount should be kept in view and that the powers of the Court to safeguard the interests of the trust were not fettered in any way, especially when the Court itself was the appointing authority of the members of the Advisory Board, as in this case. His point is that if the welfare of the trust and its protection was the paramount concern, the Court was well within its power to remove the member of the Advisory Board who was not available to the trust to render any service for such a long period and it cannot be said that the Court has wrongly exercised the power. Mr. Gopalaswami Ayyangar relies on Halsbury's Laws of England, Volume 4, 3rd edition, page 377, and also the case cited therein, namely *Letterstedt* v. *Broers*[4], in support of this proposition.

In the light of his argument the question that arises is as to whether the interests of the trust and its welfare did really demand that the petitioner a member of the Advisory Board, should be removed from office and whether his absence did really

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1. (1927) I.L.R. 51 Mad. 31: 51 M.L.J. 722 (F.B.).
2. (1913) I.L.R. 41 Cal. 19.
3. (1915) 30 M.L.J. 274 : I.L.R. 40 Mad. 177.
4. (1884) L.R. 9 A.C. 371.

contribute to any prejudice to the interests of the trust. Unless it be that his continuous absence was an impediment in the way of the proper functioning of the Advisory Board and that the interests of the Trust really suffered by reason of his continuous absence, or there were circumstances which impressed the Court that his continuous absence was a serious handicap to the smooth and efficient administration of the trust to its best advantage, it is difficult to say how the question of the protection of the interests of the trust or its welfare could be brought into the fore for removing a person who has not attended, especially when it was not made compulsory on him to attend or when he was not put on notice that if he failed to attend a certain number of meetings he should forfeit his place. No doubt Mr. Gopalaswami Ayyangar said that one of the conditions imposed for eligibility to be a member of the Advisory Board is that he should be a resident of the municipal limits of Nagapattinam and since the present petitioner was not available in Nagapattinam, within its municipal limits, the President of the Advisory Board and the managing trustee of the trust were both of them within their province to take the matter to the District Judge and the District Judge was justified in removing the petitioner and appointing another in his place. In this case, it is not so much a question of error of jurisdiction to justify intervention under section 115, Civil Procedure Code; but it is largely a question as to how far the power exercised by the learned District Judge has been exercised in a proper and judicious manner. When the petitioner left India he had taken leave of the President of the Advisory Board and after having gone there, when he fell ill he had also intimated to the President that he was ill and was convalescing and expected to return within a month. He also sent a medical certificate, though he was not compelled to send any medical certificate about his illness and detention for reasons beyond his control. Such being the case, as already observed, there was no ground for the Managing trustee or the President of the Advisory Board to suspect the *bona fides* of the petitioner or to feel that his absence had done any serious wrong or caused any prejudice or detriment to the interest of the trust. In the absence of proof of these, the order of the District Judge cannot be supported.

Mr. Vaidialingam raised a further point which he said militated against the legality of the order passed by the learned District Judge. He argued that even granting that the District Judge had power to remove a person whom he had nominated to the Advisory Board, still such removal cannot take place without a notice being issued to the person concerned to show cause why he should not be removed from office, and that it was necessary in the interests of natural justice that the person sought to be removed and against whom an order was being sought to be made should be put on notice and he should be given an opportunity to explain and show cause why such an order should not be passed against him. Notice was required to be sent to him to show as to whether his inability to render service, which was all that counted according to Mr. Gopalaswami Ayyangar, was really for reasons beyond his control, or it was sheer neglect and indifference to the duties expected of him as a member of the Advisory Board. No doubt it may be open to the appointing authority to think of a more useful and competent person when the one appointed by it was not rendering service as could be expected or had proved himself to be incompetent or otherwise disqualified. But that is not the case here. The petitioner was always willing to come back and render service as a member of the Advisory Board, and possibly if notice had been given to him, there was every chance of his rushing back to India and begin functioning as a member of the Advisory Board. But no such notice has been given to him after the two authorities, namely, the President of the Advisory Board and the Managing trustee of the Darga, had reported to the District Judge that the petitioner was absenting himself for a long period from attending meetings of the Board. Mr. Gopalaswami Ayyangar however contended that notice was not necessary in such a case, beacause it was not a question of a trustee and his removal that were involved in this cose, but merely an honorary member of the Advisory Board and that notice was usually and generally required to be given only when the person who was to be given notice was holding any right as that of a freehold. According to him, a member of the Advisory Board does not hold any property in the legal sense by virtue of his being a member of such an Advisory Board.

The functions of the Board are merely advisory and in that capacity only the petitioner has been nominated by the District Court. Trusteeship as such has been held to be a "freehold interest" but this office of Advisory Board cannot be put in the same catagory as Trusteeship. There was therefore nothing wrong in the Court not having given notice to the petitioner before he was removed from office is the argument of Mr. Gopalaswami Ayyangar. I do not think I can agree with the contention put forth by Mr. Gopalaswami Ayyangar. The petitioner did hold an office and he had a right to hold that office by virtue of his having been appointed as a member and that office as has been contended for by Mr. Gopalaswami Ayyangar involved some rights and duties. The Advisory Board is charged with several functions and duties. The Board has effective power of the administration of the Darga by the trustees and it has to be in constant touch with the affairs of the Darga as managed by the Board of trustees. The membership of such a Board, though it may be only an Advisory one is certainly a privilege and a right which he is entitled to hold and enjoy and if a person is to be deprived of that privilege and right, it is but natural justice that he should be given due notice before his removal takes place. Mr. Vaidialingam has contended that the removal of the petitioner from his membership of the Advisory Board amounts virtually to a dismissal from his office. Whether it could be considered to be a dismissal from his office or not, nevertheless the fact remains that the order passed by the learned District Judge was an *ex parte* order on two letters, demi-official received from the President of the Advisory Board and the Managing Trustee. The question is how far such an *ex parte* order against the member of the Advisory Board was justified in the circumstances. Unless there is gross misconduct or misbehaviour in his office and such is proved before the appointing authority, any suspension or removal would not be justified. In this case, it cannot be said that mere absence would tantamount to a misconduct of any kind, especially when there is no provision, as already observed more than once in the scheme decree that if a member is absent from any meetings he should lose his office or forfeit the same. In this connection a reference to *Tiruvambala Desikar* v. *Manikkavachaka Desikar*[1] and the observations made at page 190 becomes relevant. The learned Judge has observed at page 190 as follows :

"It is not suggested in the present case that any notice was given to the defendant by Sivagnana of the charges on which he purported to dismiss him after his return from Benaras, and consequently such dismissal is wholly void and inoperative and the defendant, if he has not already succeeded by virtue of Exhibit S, remained the junior Pandarasannadhi and on Sivagnana's death was his legal representatives and entitled to succeed him."

In *Letterstedt* v. *Broers*[2], the House of Lords quoted section 1289 in Story's Equity Jurisprudence to the following effect ;

"But in cases of positive misconduct, Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust ; it is not indeed every mistake or neglect of duty, or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a course, But the acts or omissions must be such as to endanger the trust property or to show a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity",

and further observed as follows :

"It seems to their Lordships that the jurisdiction which a Court of Equity has no difficulty in exercising under the circumstances indicated by Story is merely ancillary to its principal duty, to see that the trusts are properly executed. This duty is constaantly being performed by the substitution of new trustees in the place of original trustees for a variety of reasons in non-contentious cases. And therefore, though it should appear that the charges of misconduct were either not made out, or were greatly exaggerated, so that the trustee was justified in resisting them, and the Court might consider that in awarding costs, yet if satisfied that the continuance of the trustee would prevent the trust being properly executed, the trustee might be removed. It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate."

These observations though they apply to trustees are still apposite in this case in that the learned counsel for the respondent had not succeeded in showing that there has been anything on the part of the petitioner that could be legitimately claimed to entail any danger to the trust property or to show a want of honesty, or a want of

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1. (1915) 30 M.L.J. 274 ; I.L.R. 40 Mad. 177. 2. (1884) L.R. 9 A.C. 371 at 385.

proper capacity to execute the duties, or a want of reasonable fidelity. No such thing has been alleged or proved against the petitioner in this case.

It must also be remembered that in ordering the removal of a member of the Advisory Board the Court was exercising only judicial functions and it was determining as to whether a member of the Advisory Board was competent any more to hold the office or whether he has ceased by reason of the circumstances complained against him to hold the office any further. In exercising such judicial functions and in determining the rights of a member of the Advisory Board to hold office or otherwise, certainly the principles of natural justice require that there should be notice given to him in order to show that he had not acted in such a manner as to deserve a removal from his office. Mr. Vaidialingam has invited my attention to numerous decisions on this point and I do not think I need go into each one of them in detail. It is sufficient for me to state that these decisions lay down the proposition that in a case where the Court is called upon to exercise judicial functions in determining the rights and liabilities of parties, the party should be before the Court and the Court should hear whatever explanations that the party might be willing to offer before any adverse order is passed against him. These decisions are : *Balakrishna Udayar* v. *Visudeva Ayyar*[1], *Ranganatha Thathachariar* v. *Krishnaswami Thathachariar*[2], *Lakshmana* v. *Govindan*[3], *Ebrahim Saheb* v. *Regional Transport Authority, Tanjore*[4], and *Seetharamaiya* v. *Bhaskaranarayana*[5]. In my view the absence of notice to the petitioner before his office was held to have been vacated and before it could be filled up by another person, notwithstanding the fact that the appointing authority was competent to remove a person, is certainly not legal, nor proper and is vitiated. It does not appear to be also the case that the complaining parties have really made out a case for the removal of the petitioner from his office knowing as they do that he was absent from Nagapattinam only with a view to return to his place of permanent residence and that he was prevented by reasons beyond his control in doing so in the immediate future.

Therefore, considering all the circumstances, I am of the opinion that the order of the learned District Judge was not competent and that it was not rightly made. This order therefore has to be set aside and it is set aside accordingly. Until the expiry of the period of three years the petitioner will therefore be deemed to continue to be the holder of the office of membership of the Advisory Board. This Civil Revision Petition is therefore allowed with costs.

V.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

V. S. T. Thanusthaseem Hammepalli Madarasa, Melapalayam, Tirunelveli District, represented by its Huqdar, V. S. T. Syed Thameem .. *Petitioner**

v.

Melapalayam Municipality, represented by its Commissioner, Melapalayam, Tirunelveli District .. *Respondent.*

Madras District Municipalities Act (V of 1920), section 260 (2)—Property tax in respect of markets—Basis of levy—Gross income from the market—If could be the basis.

Having regard to the nature of the fees that are generally collected in a market, it cannot be said that all of them constitute income from the property as such. Hence the levy of property tax by a Municipality in respect of a market on the basis of the gross income is not correct as that income would include not only the rent for the use of the property but also other payments made or fees received by the owner of the market. Fees levied in a market which are not in the nature of rent but which could by virtue of section 260 (2) of the District Municipalties Act and the notifications

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1. (1917) 33 M.L.J. 69 : L.R. 44 I.A. 261 : I.L.R. 40 Mad. 793 (P.C.)
2. (1923) I.L.R. 47 Mad. 139.
3. A.I.R. 1939 Mad. 969.
4. (1950) 2 M.L.J. 592.
5. (1954) 2 M.L.J. (Andhra) 226.

* Writ Petition Nos. 151 to 153 of 1957. 27th March, 1959.

issued thereunder be levied and collected by the owner, could not properly form part of any basis for assessment for purposes of property tax for the market.

Where an assessment of tax includes an item which could not properly be included, the whole assessment would be invalid, unless the part which is invalid is severable from the rest.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed with W.P. No. 151 of 1957 on the file of the High Court the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the Demand Notice Nos. 176, 362 and 112 (Assessment No. 9518) for the half-years ending 31st March 1955, 31st March 1956 and 30th September 1955 respectively for House No. 177, Hameempuram Street, Melapalayam and quash the said notices.

The Advocate-General (*V. K. Thiruvenkatachari*) and *T. Martin*, for Petitioner.

K. Veeraswami (The Additional Government Pleader), for Respondent.

The Court made the following

ORDER.—These are applications under Article 226 of the Constitution to call for the records connected with the Demand Notice No. 176 (Assessment No. 9518) for the half year ending 31st March, 1955 and Demand Notice No. 362 (Assessment No. 9518) for the half year ending 31st March, 1956 and Demand Notice No. 112 (Assessment No. 9518, for half year ending 30th September, 1955 for Door No. 177, Hameempuram, Melapalayam and to quash the proceedings of the respondent Municipality relating thereto.

The petitioner is a charitable institution, who owns a private weekly market in Melapalayam. The market consists of land with sheds and buildings bearing municipal door numbers 144 to 177. Upto and during the year 1955-1956 each of the aforesaid numbers had a separate annual value put on it for the purpose of assessing the property tax under section 82 of the Madras District Municipality Act. The total value for Nos. 144 to 176 was Rs. 1,266 and that for No. 177 was Rs. 36, the entire market was thus assessed to Rs. 1,302. On 2nd March, 1956, the petitioner was served with a notice under rule 4 of Schedule IV of the Madras District Municipalities Act containing a proposal to enhance the property tax. That notice was to operate for 3 half years from the second half of 1954-1955. In pursuance of that notice there was an assessment which resulted in an increase of the property tax by about 5 or 6 times. The assessment in regard to numbers 144 to 176 is not challenged now. These writ petitions relate to the assessment of door No. 177 for the second half year of 1954-1955 and for the two half years of 1955-1956. It is unnecessary to refer to the details in regard to the assessment beyond stating that the assessment of the annual value was arrived at on the basis of the levy of licence fee for the market which was 15 per cent of the gross income for the previous year from the market. The licence fee for the market was Rs. 1,275. This was fixed at 15 per cent of the gross income of the market by way of fees. From that the total income from the property, Nos. 144 to 177 was taken to be Rs. 8,526. Deducting the annual rental value of door Nos. 144 to 176 as found in the books the annual rental value for door No. 177 was arrived at a sum of Rs. 7,260. It may be noticed that the assessment in respect of the very same property during the first half of 1954-55 was only Rs. 36. The petitioner complains that this assessment was *mala fide* and was also otherwise without jurisdiction.

It is clear from the above that the assessment was adopted on the basis of the gross income received by the petitioner from the market for the previous year.

Section 260(2) of the Madras District Municipalities Act specifies the kinds of fees that may be levied in a market. It states :

"The council may in any public market levy any one or more of the following fees at such rates and may place the collection of such fees under the management of such persons as may appear to it proper or may farm out such fees (for any period not exceeding three years at a time and) on such terms and subject to such conditions as it may deem fit :

(*a*) fees for the use of, or for the right to expose goods for sale in, such markets ;

(*b*) fees for the use of shops, stalls, pens or stands in such markets ;

(*c*) fees on vehicles or pack animals carrying, or on persons bringing, goods for sale in such market ;

(*d*) fees on animals brought for sale into, or sold, in such markets ; and

(*e*) licence fees on brokers, commission agents, weighmen and measurers practising their calling in such markets."

From the above it can be seen that the fees leviable in respect of a market is not always referable to the value of the property as such or the user of the soil. For instance the levy of a fee on vehicles which bring the goods for sale in the market, and on brokers, commission agents and weighmen cannot in any sense be said to be a fee in respect of the occupations of the property. Section 78 of the District Muncipalities Act is the charging section, which authorises the levy of property tax. Section 82 which relates to the method of assessment of the property runs thus :

"(1) Every building shall be assessed together with its site and other adjacent premises occupied as an appurtenance thereto unless the owner of the building is a different person from the owner of such site or premises.

(2) The annual value of lands and buildings shall be deemed to be the gross annual rent at which they may reasonably be expected to let from month to month or from year to year. (Less a deduction, in the case of buildings, of ten per cent. of that portion of such annual rent which is attributable to the buildings alone, apart from their sites and the adjacent lands occupied as an appurtenance thereto) and the said deduction shall be in lieu of all allowance for repairs or on any other account whatever".

It is unnecessary to refer to the proviso to that sub-section and to sub-section (3) of that section. Section 82(2) makes it plain that the annual value of the lands is the gross annual income which may be expected from the property. The word rent itself implies that it is a profit from the property demised. The measure of rateable value is, therefore, defined by the statute as the rent which may be reasonably expected.

In *M. S. M. Railway Co., Ltd.* v. *Bezwada Municipality*[1], the Privy Council observed at page 6 :

"Section 82 (2) prescribes how the annual value of lands and buildings is to be ascertained. It is to be deemed to be the gross annual rent at which they may reasonably be expected to let from month to month or from year to year less 10 per cent. in the case of buildings. The spectre of the hypothetical tenant, so familar an apparition in English rating law, is here invoked."

The criterion for the assessment is the rent at which a hypothetical tenant might reasonably be expected to pay for the property in question. As the word rent implies a return or profit for the use of the property, payment that can legitimately be taken as a basis for the calculation of the annual value would be that which would be referable to the use of the property and not any other kind of income which the owner may get.

The question, therefore, is whether in regard to the assessment of a market, the gross income earned by the owner of the market, could be taken to be the annual rent which the property would yield if let out to a tenant. I have already referred to the nature of the fees that are generally collected in a market not all of which could be said to be income from the property as such. The municipality in the instant case has proceeded to assess the market to property tax on the basis of the licence fee. The licence fee is calculated at 15 per cent. of the gross income from the market. Such income would include not merely that referable to the rent for the use of the property but also other payments made or fees received by the owner of the market which are set out in section 260(2) of the Act.

In England the right to hold a market is in general, a franchise granted by the King. That conferred a right to hold a concourse of buyers and sellers to dispose of the commodities in respect of which the franchise was given. The essence of such franchise is that the holder had the monopoly of the market. That monopoly carried with it a right to exclude other persons from holding market in the same area.

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1. (1944) 2 M.L.J. 25 : I.L.R. (1945) Mad. 1: L.R. 71 I.A. 113. (P.C.).

The holder of the franchise was also entitled by virtue of the grant to levy fees for entry into the market. Such a right is not known to the Indian Law, where the holding of a market is an incident of the property. A person, therefore, who owns the property can hold a market in India. But the principles of law relating to rating under the English Law afford guide for appreciating or elucidating the various items of income from a market which could properly be taken account of in assessing the value of a property. In 25 Halsbury's Laws of England (Simonds edition,) at page 397 it is stated thus :—

"The franchise of toll is an incorporeal hereditament, and as such was formerly assessable to the land tax, but land tax remains chargeable only where it was chargeable on a property for the land tax year 1948-1949 and the property has not been exonerated.

Inasmuch as tolls in the strict sense of he term, unlike stallages are profits, not of the soil, but of the market, payable in respect of the use of the market and not in respect of any user or occupation of the market-place, they cannot be taken into account in estimating the value of the market-place for the assessment to the general rate, (*b*) and this is euqally the case whether they are granted by charter or payable by statute, and whether they are payable by the buyer upon sales in the market or upon the entry of goods into the market and (*e*) although they are taken by a corporation and applied to public purposes."

In *The Queen* v. *Caswell*[1], it was held that tolls authorised to be taken by an Act of Parliament, in respect of cattle brought into a market for sale, which become due as soon as the cattle were brought into the market place, and before the cattle were put into a pen or tied up, were mere market tolls, and not in the nature of stallage or tolls taken in respect of the use of the soil ; and in assessing the lessee of the market and tolls to the poor-rate in respect of his occupation of the market place, such tolls could not be taken into account as enhancing the value of the occupation.

At page 331, Cockburn, C.J., observed as follows ;—

"I am of opinion that this toll, payable for the admission of cattle into the market, is not properly the subject of a rate. The distinction between market tolls and stallage has been long taken and established ; though it is, in my opinion to be regretted : for a man, who occupies the soil of a market with the occupation enhanced in value by reason of this toll ought to be assessed to the rates and contribute to the public burthens in proportion to the value of his occupation. But we must abide by the distinction founded on this principle of ancient law, and take it as established that tolls payable merely as market tolls for the use of the market are not rateable, whereas the toll paid for the use of a stall which occupies the soil is rateable."

In that case the distinction made was between the tolls for commodities brought into the market use by virtue of the franchise and not those levied for the use of the land, the latter category alone being taken into account for the levy of a rate. As I have indicated above there is no question of franchise in this country. But that does not mean that all the fees that are levied in the market are for the use of the property. For instance the fees levied in a market may be either for occupation or for mere entry. It is possible to conceive of cases where a person who does not want to occupy any portion of the market brings headloads of goods to deliver over to a vendor in the market. It cannot be said that that person is occupying any portion of the market so as to include the fee paid by him as one in respect of occupation of the premises. Section 260 enables the owner of the market to levy fees on brokers and other businessmen. It cannot be said that such fees are in respect of any property or the occupation of the soil thereof.

Mr. K. Veeraswami, who appeard for the municipality referred to the decision in *Percy* v. *Ashford Union*[2]. In that case a person was rated as the occupier of tolls, lands and buildings situated in a cattle market and amongst the gross receipts upon which the valuation was estimated were items for the cattle admitted into the market. A question arose whether the tolls levied for admitting cattle into the market were incident to the soil so as to be taken into consideration for increasing the rates and were not mere market tolls which could not be so rated. It was contended that the levy of fees in regard to the tolls above mentioned were deemed to be under a franchise or incorporeal hereditament and not an incident to the soil. The learned Judges found that there was no evidence of the franchise in the case granting such

1. (1872) L.R. 7 Q.B. 328. 2. (1876) 34 Law Times 579.

a right. That decision could only be treated as one based on the facts proved. In *Duke of Bedford* v. *Overseers of St. Paul Covent Garden*[1], it was held that where a market was divided into various stands, shops, or stalls like potato stands, fruit market, flower stands, the tolls levied in respect of such market arose out of the use of the soil and were in the nature of stallage tolls so as to be rateable under the appropriate enactments. It was held in that case that if no specific place was appropriated it should be held to be a toll in the nature of a franchise and not rateable. But if the tolls were paid in respect of the user of definite portion of the soil, they being in the nature of stallage income, could be taken into account for the purpose of assessing the rate.

This question has been dealt with in Ryde on Rating, 1946 Edition, at pages 488 to 497, and referring the two cases referred to above the learned author observes that the real distinction between the two cases, is that in *R.V. Caswell*[2], there was no specific appropriation of particular parts of the markets by particular classes of cattle whereas in *Duke of Bedford* v. *Overseers of St. Paul Covent Garden*[1], the market was divided into horse stands, fruit markets, flower stands etc. It is however clear that the assessment for rate under Enlgish Law was on the basis of the income received by the use of the soil, and not other income from the property.

Under section 82 (2) of the Madras District Municipalities Act, it is only the rent of the hypothetical tenant that should be ascertained and the property assessed for the purpose of taxation. Fees levied in a market which are not in the nature of rent but which could by virtue of section 260 (2), and the notification thereunder be levied and collected, could not properly form part of any basis for assessment for the purpose of property tax. In the present case the municipality was clearly in error in taking the total licence fee collected from the market as the basis of the levy of property tax for the market.

In this connection Mr. Veeraswami, the learned Advocate for the municipality, referred me to the decision in *Madurai Municipality* v. *Kamakshisundaram Chettiar*[3]. In that case it was held that though the fair rent was fixed for a building under the provisions of the Madras Buildings (Lease and Rent Control) Act, 1949, the Municipality was not precluded from taking that rent alone, while a higher rent was actually received or could reasonably be expected to be received. That decision was only concerned with the case as to whether the assessing authority could on the terms of section 82 base the assessment on the rental income by a hypothetical tenant or was restricted to the fair rent fixed under the Control Acts. On the terms of section 82, the learned Judges held that the former was the correct basis. That decision, however, did not concern itself with the question whether all the profits from the property should be taken into account or only that portion of the profits referrable to the rental value alone should be taken into consideration while assessing the annual value under section 82.

In *Ramanarain Sons, Ltd.* v. *Assistant Commissioner of Sales Tax*[4], the Supreme Court observed at page 497 that when an assessment is not for an entire sum, but for separate sums, dissected and earmarked each of them to a separate assessable item, a Court can sever the items and cut out one or more along with the sum attributed to it, while affirming the residue. But in respect of the totality of the property treated as assessable the wrongful inclusion in it of certain items of property which by virtue of a provision of law were expressly exempted from taxation rendered the assessment invalid *in toto*. The learned Judges of the Supreme Court approved of a passage in *Bennett and White (Calgary), Ltd.* v. *Municipal District of Sugar City*[5], at page 816 to the following effect :—

" When an assessment is not for an entire sum, but for separate sums. dissected and earmarked each of them to a separate assessable item, a court can sever the items and cur out one or more along with the sum attributed to it, while affirming the residue. But where the assessment consists of a

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1. 51 Law Journal (M.C.) 41.
2. (1872) L.R. 7 Q.B. 328.
3. (1955) 2 M.L.J. 369.
4. (1955) S.C.J. 808 : (1955) 2 M.L.J. (S.C.) 302 : (1951) 2 S.C.R. 483 (497).
5. L.R. (1951) A.C. 786, 816.

single undivided sum in respect of the totality of property treated as assessable and when one component (not dismissible as *de minimis*) is on any view not assessable and wrongly included, it would seem clear that such a procedure is barred, and the assessment is bad wholly. That matter is covered by authority. In *Montreal Light, Head and Power Consolidated* v. *City of Westmount*[1], the Court (*see* especially per Anglin, C.J.) in these conditions held that an assessment which was bad in part was infected throughout, and treated it as invalid. Here their Lordships are of opinion, by parity of reasoning, that the assessment was invalid *in toto*".

From the above statement of the law, it is clear that where an assessment includes in it an item which could not properly be included the whole assessment would be invalid, except in those cases where the part which is bad is severable from the rest. There is no evidence in the present case as to which of the items of fees levied by the owner of the market are exempted from being included as rental income from the property. It should, therefore, be held that the entire assessment is invalid and made without jurisdiction.

I, therefore, issue the writ prayed for quashing the orders for the period covered in these three writ petitions.

R.M. — *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE BALAKRISHNA AYYAR.

Rayalseema Constructions by Managing Partner C. V. Venugopal.. *Petitioner**

v.

The Deputy Commercial Tax Officer, Mannady Division, Madras .. *Respondents.*

Constitution of India (1950), *Article* 265—*Scope and effect of—Power to impose or collect tax—Limits.*

Article 265 of the Constitution of India provides that no tax shall be levied or collected except by authority of law. The words 'levy' and 'collection' are used in the article in a comprehensive manner and they are intended to include and cover the entire process of taxation commencing from the taxing statute to the taking of the money from the citizen. The Article enjoins that every stage in this entire process must be authorised by law.

The mere fact that an assessment has been made and the aggrieved party has not pursued his remedies under the taxing statute does not by itself make the assessment lawful or legal if the assessment itself is made in pursuance of an *ultra vires* provision or is made without any jurisdiction. There is no question of such assessments becoming final under the taxing statute. A mistake in the exercsie of the power has to be rectified by resort to the normal remedies of appeal, revision, etc. But where there is a total want of jurisdiction, a mere attempt to usurp jurisdiction can be restrained.

Petitions under Article 226 of the Constitution of India, praying that in circumstances stated therein, and in the affidavits filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the respondent herein to forbear from realising from the Petitioners herein the arrears of tax claimed under assessment Nos. A-2/11168/51-52, dated 25th March, 1953, and A-2/11168/ 52-53 dated 3rd December, 1953.

M. Natesan, T. T. Srinivasan and *A. N. Rangaswami*, for Petitioner.

The Advocate-General (*V. K. Thiruvenkatachari*) to assist the Court and the Additional Government Pleader (*K. Veeraswami*), on behalf of the Respondents.

The Judgment of the Court was delivered by

Balakrishna Ayyar, J.—The questions for determination in all these three writ petitions are the same; and, we shall therefore deal with them together.

The relevant facts are these. The Rayalseema Constructions, who is the petitioner in Writ Petition Nos. 91 and 142 of 1957, is a firm of construction engineers. For the year 1951-1952 the firm was assessed under the Madras General Sales Tax Act, 1939, on a gross turn-over of Rs. 2,23,174-10-0 as on "works contracts". The Order of assessment was made on 25th March, 1953, and, it was then determined

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1. 1926 S.C.R. (Cal.) 515.

* W. P. Nos. 91, 142 and 270 of 1957. 2nd February, 1959. 13th Magha of Saka, 1880.

that a sum of Rs. 2,440-15-7 was payable by the firm. Deducting the payments made by the firm a balance of Rs. 775-15-9 remains due in respect of this assessment. For the year 1952-1953, the gross turn-over of the firm was computed to be Rs. 2,54,666-13-9 and the assessment was made in a sum of Rs. 2,785-6-9. Deducting the various payments made by the firm a sum of Rs. 1,725-6-9 remains due in respect of this assessment.

The Department demanded payment of these sums amounting to Rs. 2,501-6-4. By that time this Court had held in *Gannon Dunkerlay* (*Madras*), *Ltd.* v. *The State of Madras*[1], that " works contracts " did not involve any element of sale of materials and that therefore the levy of sales tax in respect of those materials was unlawful. The petitioner pointed this out to the Commercial Tax Officer on 3rd August, 1954. Nothing happened for a long time. But, on 26th November, 1956, the Deputy Commercial Tax Officer wrote to the petitioner that he had been directed to take steps to collect this arrear under the Revenue Recovery Act, and, in view of that, he called upon the petitioner to pay up this amount. The subsequent representations which the petitioner made to the appropriate authorities proved of no avail. The petitioner has therefore come to this Court, for the issue of a writ of *mandamus* or other suitable direction, to the Deputy Commercial Tax Officer, Mannady Division, Madras 1, requiring him to forbear from collecting these amounts.

The petitioner in Writ Petition No. 270 of 1957 is a firm of tanners belonging to Vaniyambadi, which held a licence under the Madras General Sales Tax Act. In an order which he had made on 31st March, 1955, the Deputy Commercial Tax Officer found that the total turn-over of the firm was Rs. 3,83,883-7-9. Of this only a sum of Rs. 5,787-12-0 represented the value of purchase made inside the State of Madras. The balance of Rs. 3,78,095-11-9 was the value of untanned hides and skins which the petitioner firm had purchased outside the State of Madras. The Deputy Commercial Tax Officer exempted a sum of Rs. 32,314 representing the value of untanned hides and skins which were sold as such by the petitioner firm and assessed the petitioner on the balance of Rs. 3,45,761-11-9.

This Court held in *Hajee Abdul Shukoor & Co.* v. *State of Madras*[2] that :

" Under rule 16 (3) (i) it is only the sale of untanned hides and skins by a licensed dealer to a licensed tanner who tans the same that gives rise to a tax liability. Purchases of untanned hides and skins by tanners from persons other than licensed dealers are not within the taxing provision.

Therefore in computing the purchase turn-over of a licensed tanner only the sales to him from licensed dealers could be included."

In view of this decision the petitioner firm filed an appeal to the Commercial Tax Officer on 21st February, 1956. But he dismissed the appeal on the ground that it was barred by time. The further appeal to the Sales Tax Appellate Tribunal also failed for the same reason. In these circumstances, the petitioner has come to this Court for the issue of an appropriate writ to prohibit the State of Madras recovering the amount from the petitioner.

The case for the petitioners is that since it has now been established by the decision in *Gannon Dunkerley* (*Madras*), *Ltd.* v. *The State of Madras*[1], so far as "Works contracts " are concerned, and by the decision in *Hajee Abdul Shukoor & Co.* v. *State of Madras*[2], in respect of untanned hides and skins that the levy made upon the petitioners is unlawful they are not liable to pay the amounts, that the State has no lawful authority to require payment of net amounts and that therefore there should be a direction prohibiting the State from collecting that amount.

The case for the Government, however, is that though it may have been established by subsequent decisions that the relevant provisions of the Act and the Rules did not authorise the imposition of the tax-amounts now in question the assessments are not nullities and that they have become final. Once an assessment has become final the amount charged thereunder remains payable and the State is entitled to collect it.

1. (1955) 1 M.L.J. 87 : I.L.R. (1955) Mad. 832.

2. (1954) 6 S.T.C. 352 : (1955) 2 M.L.J. 494 (F.B.)

The arguments in the case perhaps inevitably, spread over a wide area and involved the investigation of certain subsidiary questions as to how far the decisions given by the Privy Council prior to the Indian Independence Act are binding on the High Courts, and, to what extent the existence of an alternative remedy should influence this Court in exercising its writ jurisdiction in a matter of this kind. But, we consider it unnecessary to traverse all that ground over again, and, shall confine ourselves to the decision of the main questions before us.

The situation is this. The Commercial Tax Officers who made the assessment in these cases had jurisdiction in respect of the subject-matter. They had also jurisdiction in respect of the persons concerned. At the time they made the assessments they *bona fide* believed that the assessment was in accordance with the law. But, subsequent judicial investigation showed that the law conferred upon them no power to make the levy and that therefore they had no jurisdiction to impose the tax. But, the assessments became " final " since either there were no appeals or the appeals failed on one ground or other.

In support of their contention that the Government have no power to collect the amounts involved in these petitions, learned counsel for the petitioners cited a number of decisions, and to some of these, we shall now refer.

The first of these is reported in *Sugar Syndicate* v. *Excise and Taxation Commissioner, Punjab*[1]. The petitioner in that case was the Sugar Syndicate, Bahadargarh. It was liable to pay sales tax under section 4 (2) of the East Punjab General Sales Tax Act, 1948, on the sales it effected after 31st March, 1950. The Syndicate, however, filed returns before the assessing authorities relating to sales made between 7th January, 1950 and 31st March, 1950 and paid a sum of Rs. 4,030-14-3 as sales tax on such sales. As a matter of actual fact, however, the Syndicate was not bound to pay tax in respect of those sales. The mistake was not discovered till some time in September, 1952. The Syndicate then applied for refund of the amount under section 12 of the Act. That application, however, was rejected by the concerned officer. The revision petition filed by the petitioner also failed. So it went to the High Court and asked for an appropriate writ.

It was conceded by the learned Advocate-General that the Syndicate was not liable to pay sales tax on sales effected between 7th January, 1950 and 31st March, 1950 and that its levy was not warranted by the provisions of the Act. The High Court allowed the petition and directed that a writ of *mandamus* should issue directing refund of the amount.

The argument of counsel for the petitioners was that the present are *a fortiori* cases. If money actually paid over to Government could be got back from Government, surely, it was said a direction can issue to the Government to forbear from collecting something that is not lawfully due to them.

The second case is reported on page 579 of the same volume, *State of Uttar Pradesh* v. *Kanhaiya Lal*[2]. In that case, a firm which was dealing in buillion, gold and silver ornaments, entered into forward contracts in silver as part of its business. In respect of such contracts it was assessed to sales tax in the years 1948-49, 1949-50 and 1950-51, and, the amounts were paid. In 1952 the Allahabad High Court held that the provisions of the U.P. Sales Tax Act purporting to impose sales tax on forward contracts were *ultra vires*. Thereupon the firm applied to the Commissioner of Sales Tax for a refund of the sums which had been collected from it. The refund was refused. The firm thereupon filed a petition for the issue of a writ of *mandamus* requiring the Sales Tax Officer and the Government to refund the amount. The petition was allowed by Chaturvedi, J. The State of Uttar Pradesh appealed. The Advocate-General for the State argued that the amount in dispute was paid by the respondent firm under a mistake of law and was therefore irrecoverable. This contention was negatived and the appeal dismissed.

1. (1955) 7 S.T.C. 336.   2. (1955) 7 S.T.C. 579.

It will be noticed that in this case as in the cases before us the assessment had become final under the U.P. Sales Tax Act. None the less the Court directed refund of the tax which had been collected on the basis of an *ultra vires* provision contained in the local Sales Tax Act. It must, however, be mentioned that the points taken before us, namely, that the assessment had become final and that therefore Government was entitled to collect or retain the tax, was not urged before the Allahabad High Court.

The next decision which was referred to on behalf of the petitioners is reported in *Orient Paper Mills, Ltd.* v. *State of Orissa*[1]. In that case a limited liability company called Orient Paper Mills Ltd., paid nearly Rs. 5,50,000 as sales tax in respect of its transactions from 1st January, 1950 to 31st March, 1951. The assessment included sales tax in respect of inter-State sales. When the petitioners came to know the decision of the Supreme Court in the *United Motors Case-State of Bombay* v. *United Motors (India) Ltd.*[2], they realised that no liability had been laid on them to pay sales tax in respect of inter-State sales and so applied for refundof the sums they had paid. The refund was refused. The main ground on which refund was refused was that the order of assessment not having been successfully challenged in appeal or revision had become final and that the assessment could not be re-opened merely because of the change in the law brought about by the decision of the Supreme Court. The Orissa High Court held that unless the application for refund was time-barred the taxes must be refunded.

"The mere fact that the assessment order was not challenged by way o appeal or revision unde the other provisions of the Act seems immaterial".

It will be noticed that this case is directly in point It remains to add that the decision in *State of Uttar Pradesh* v. *Kanhaiya Lal*[3], was confirmed by the Supreme Court in *Sales Tax Officer* v. *Kanhaiya Lal Mukund Lal Saraf*[4].

On the other side, the learned Government Pleader relied on *Raleigh Investment Co. Ltd.* v. *Governor-General in Council*[5], and *Commissioner of Income-Tax, West Punjab* v. *Tribune Trust, Lahore*[6].

The facts in the former case were these. The Raleigh Investment Co., Ltd., was assessed to income-tax by the appropriate Income-tax Officer who included in the income of the company dividends declared and paid outside British India to persons not resident in British India. The company contended that the provision of the Indian Income-tax Act which authorised the Income-tax Officer to do this was *ultra vires* the Indian Legislature, and, it filed a suit to recover the amount which it had paid in pursuance of the assessment. The High Court of Calcutta held that the provision was *ultra vires* and that its jurisdiction to entertain this suit was not barred by section 67 of the Income-tax Act. On appeal the Fedefal Court reversed the decision of the High Court. The Company then appealed to the Privy Council, which observed:

"An assessment made under the machinery provided by the Act, if based on a provision subsequently held to be *ultra vires* is not a nullity like an order of a Court lacking jurisdiction. Reliance on such a provision is not an excess of jurisdiction but a mistake of law made in the course of its exercise. Their Lordships therefore regard the suit as in truth directed exclusively to a modification of the assessment.

"The argument for the appellant was that an assessment was not an assessment "made under the Act" if the assessment gave effect to a provision which was *ultra vires* the Indian Legislature. In law such a provision, being a nullity, was non-existent.

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The obvious meaning, and in their Lordships' opinion the correct meaning, of the phrase "assessment made under the Act" is an assessment finding its origin in an activity of the assessing officer acting as such. The circumstance that the assessing officer has taken into account an *ultra vires* provision of the Act is in this view immaterial in determining whether the assessment is "made under

1. (1957) 8 S.T.C. 749.
2. (1953) 1 M.L.J. 743 : 1953 S.C.J. 373 : (1953) S.C.R. 1069 : (1953) 3 S.T.C. 133.
3. (1955) 7 S.T.C. 579.
4. (1958) 9 S.T.C. 747 (S.C.).
5. (1947) 2 M.L.J. 16 (P.C.).
6. (1948) 2 M.L.J. 14 (P.C.).

the Act". The phrase describes the provenance of the assessment; it does not relate to its accuracy in point of law. The use of the machinery provided by the Act, not the result of that use, is the test".

In the end, their Lordships dismissed the appeal.

It will be noticed that the principal question which their Lordships had to decide was whether or not the suit was barred by section 67 of the Indian Income-tax Act. That section so far as it is here material ran:

'No suit shall be brought in any Civil Court to set aside or modify any assessment made under his Act . . ."

This section ousted the jurisdiction of the Civil Court in respect of any assessment made under the Act. Even though a particular provision of the Act which was called in aid in order to make the assessment was *ultra vires*, by reason of that circumstance alone the assessment did not cease to be one made under the Act, and, in effect and substance, that is what their Lordships really decided. The argument on behalf of the Company was that an assessment was not an assessment made under the Act if the assessment gave effect to a provision of the Act which is *ultra vires* the Indian Legislature. The decision was that none the less the assessment would be an assessment made under the Act and therefore the jurisdiction of the Civil Court stood ousted by section 67 of the Act. It was not in contention before their Lordships that section 67 of the Indian Income-tax Act was itself *ultra vires* the Indian Legislature. That being so, the Indian Legislature could prohibit civil Courts from entertaining suits which sought to question or modify an assessment made under the Indian Income-tax Act.

This decision is only an authority for the proposition that a suit would not lie to set aside or modify an assessment made under the Indian Income-tax Act.

The next and even more important circumstance to remember about this case is that the decision was given under the Government of Indian Act, 1935, which contained no provisions analogous to Article 265 which appear in our Constitution. This Article states in explicit terms:

"No tax shall be levied or collected except by authority of law".

And this makes a vital difference. We have an express prohibition against the levy or collection of tax save under the authority of law and the Constitution also provides remedies for enforcing that prohibition. The Government of India Act, 1935, contained no such provisions.

The facts in *Commissioner of Income-tax, West Punjab* v. *Tribune Trust, Lahore*[1], were as follows: In respect of the assessment for the year 1932-33 the Tribune Trust, Lahore, claimed exemption under section 4 (3) (i) of the Income-tax Act. The matter was finally decided by the Privy Council in favour of the assessee. Meanwhile during the pendency of the appeal before the Privy Council assessments continued to be made in respect of the same property disallowing the claim for exemption which the assessee had preferred. The assessee did not appeal against the orders disallowing its claim. After the assessee succeeded before the Privy Council in respect of the year 1932-33 the assessee applied to the Commissioner to re-open the assessments for the years subsequent to 1932-33 and quash the assessments as they had become a nullity in view of the decision of the Privy Council. The Commissioner of Income-tax rejected the applications. On a case being stated, the High Court ruled in favour of the assessee. The Commissioner of Income-tax appealed to the Privy Council and the appeal was allowed. Their Lordships observed:

"Upon this footing, then the argument must be that the assessee has a right enforceable against the Commissioner to require refund of tax paid by him upon grounds of equity and good conscience though the assessment has been made and the tax received in good faith.

Their Lordships cannot accept this argument. They have reviewed the Code of Income-tax law for the purpose of showing that it exhaustively defines the obligations and remedies of the taxpayer. It would be wholly incompatible with this that he should have collateral right, necessarily

1. (1948) 2 M.L.J. 14 (P.C.).

vague and ill-defined founded on the principles of equity and good conscience. Their Lordships are of opinion that the only remedies open to the tax-payer, whether, in regard to appeal against assessment or to claim for refund, are to be found within the four corners of the Act. This view of his rights harmonises with the provision of section 67 to which reference has already been made, that no suit shall be brought in any Civil Court to set aside or modify any assessment made under the Act. It is the Act which prescribes both the remedy and the manner in which it may be enforced."

This case presents no difficulty. The Officer who made the assessment had jurisdiction as regards the subject-matter. He has also jurisdiction as regards the assessee concerned. All that happened was that he made a mistake in applying certain provisions of the Act. It was not a case of want of jurisdiction but, a case where an erroneous decision was given in respect of a matter in respect of which jurisdiction undoubtedly existed. In the case before us, the question is one of jurisdiction, or rather of lack of jurisdiction on the part of the concerned Sales Tax Officers. The officers concerned thought that they had jurisdiction to act as they did, but, it was subsequently discovered that they had no such jurisdiction. It may next be observed that the remedies now available to the citizen in the writ jurisdiction of this Court did not then exist.

The learned Advocate-General who assisted us in this case at our request took us to some of the earlier Government of India Acts and explained in detail the difference between the levy of a tax, the assessment of a tax and the collection of a tax.

Lord Denedin in *Whitney* v. *Commissioner of Inland Revenue*[1], stated as follows:

"Now there are three stages in the imposition of a tax : there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next there is the assessment. Liability does not depend on assessment. That, *ex hypothesi*, has already been fixed. But assessment particularizes the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay."

The learned Advocate-General pointed out that each of these three stages is separate and complete and contended that a person who objects to the amount of the tax imposed on him ought to avail himself of the remedies provided by the taxing statute, and, if the assessment has become final either by reason of the fact that the assessee failed to avail himself of the remedies provided by the Act or because those remedies became unavailing, he cannot thereafter complain. Once the assessment has become final all that remains to be done is to collect the tax assessed. At that stage the assessee can no doubt complain if an attempt is made to collect the money from him in a manner or a mode which is not permitted by the law ; but he cannot object or complain about the actual collection itself.

Referring to Article 265 of the Constitution, the learned Advocate-General argued that it did not permit the calling in question of an assessment that had already become final. The Article really consists of two parts. The first part states that no tax shall be levied except by authority of law. The second part says that no tax shall be collected except by authority of law. When the stage of collection is reached, all that the Article says is that the *Manner* of collection must be authorised by the law. The State is prohibited froms adopting illegal or arbitrary methods of collecting the tax already levied and assessed. That is all. At this stage the assessee does not get a right to challenge the correctnes of the assessment already made. Once the tax is assessed it becomes the duty of the appropriate officer to collect the tax. The stage at which the legality of the assessment can be qestioned is by then past.

We do not by any means feel assured that Article 265 can or ought to be cut up in the manner that the argument of the learned Advocate-General requires. The word "levy" is frequently used to include both of the first two stages involved in the process of taxation, *viz.*, the levy properly so-called and the determination of the amount of the tax. It appears to us that the words "levy" and "collection" are used in Article 265 of the Constitution in a comprehensive manner and that they are intended to include and envelop the entire process of taxation commencing from the taxing Statute to the taking away of the money from the pocket of the citizen. And

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1. L.R. 1926 A.C. 37.

what Article 265 enjoins is that every stage in this entire process must be authorised by the law.

Even if it be permissible to cut up Article 265 in the manner which the learned Advocate-General suggested, it will be difficult to deny the petitioners the relief they seek. The petitioners are not objecting to any *Mode* of collection. Their objection is more fundamental. They object to the collection itself. The answer given on behalf of the State to this objection of theirs is that the assessment has become final. Now, to say that an assessment has become final is not equivalent to saying that the assessment is lawful as has been demonstrated in the present case. When we say that an assessment has become final all that we ordinarily mean is that the assessee may no longer challenge it in the manner provided by the appropriate Statute, that is to say, by resorting to the remedy of appeal, revision or reference, as the case may be, It may be that these remedies have been tried unsuccessfully or it may be that the time within which these remedies should have been sought has expired. But it does not follow that the assessment is lawful. Suppose for example a citizen is engaged in buying or selling not merely rice and wheat but also lands and houses. Suppose also the Sales Tax Officer includes in the turn-over of his business not merely the value of the rice and wheat but also the value of the lands and houses he has dealt with in the year and charges sales tax on the whole. There can be no doubt whatever that the levy of sales tax so far as it relates to immoveable property would be illegal. The Sales Tax Officer would have no jurisdiction whatever to do that. None the less, if owing to some reason or other the assessee omits to appeal the assessment would have become final. The finality of an assessment under the terms of a taxing Statute is not always or necessarily conclusive of the legality of the assessment. An assessment made without jurisdiction, or in pursuance of a provision which is found to be *ultra vires* continues to be unlawful, and, nothing less than a validating provision properly enacted would alter that fact.

The solution to the problem raised by the present petitions is really to be found in the old and familiar distinction between an act done in excess of jurisdiction and an erroneous exercise of jurisdiction. Laws have to be worked through human agency, and, men are liable to err. The Constitution does not guarantee that the persons employed to administer the law will not make mistakes when exercising the powers conferred on them. If they make mistakes in the exercise of their powers, the persons affected must ordinarily use the remedies of appeal, reference or revision, as the case may be. But, where there is an absence of jurisdiction the situation is materially altered. And, it would not make any difference whether the absence of jurisdiction arises out of an attempt to usurp jurisdiction, or because the officer has though ignorance or otherwise strayed beyond the limits of his jurisdiction. In relation to a tax, where an assessing officer acts outside the boundaries of his jurisdiction his acts would to that extent be null and void. No one would have any power to call upon a citizen to make payment of a tax so imposed, and, if any authority seeks to collect a tax so imposed, the citizen can call in aid Article 265 and, seek the assistance of this Court.

There was some argument as to the exact nature of the writ that may issue in a case of this kind. We are of opinion that a writ of *mandamus* should issue directing the respondents to forbear from collecting the amounts which form the subject-matter of these petitions.

There will be no order as regards cost.

R.M. *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(APPELLATE JURISDICTION).

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE GANAPATIA PILLAI.

The Vanguard Fire and General Insurance Co., Ltd., represented by its General Manager, Sri H.D. Rajah .. *Appellant**

v.

Messrs. Frasee & Ross, Chartered Accountants, Madras and another .. *Respondents.*

Insurance Act (IV of 1938), sections 2 (9), 2-D and 33—'Insurer'—If includes a company ceasing to carry on the business—Investigation into the affairs of the company.

Interpretation of statutes—Definition term—Meaning in other provisions of the Act.

The term 'insurer' in section 2-D of the Insurance Act must in certain circumstances be also understood as a body corporate which *had* been carrying on insurance business but has ceased to do that business and it would therfore be subject to all the provisions of the Act.

The word 'insurer' occurs in several sections of the Act but it is obvious that in every place where it is used it would be anomalous to import the definition contained in section 2 (9) (*b*) in its entirety.

When a term is defined in an enactment,wherever that term occurs the definition would ordinarily apply ; but there is a well-known canon of construction that in certain circumstances when a strict adherence to the rule would lead to an anomaly or repugnanee,the rule would apply only when there is nothing repugnant to it in the context.

If there is sufficient material from which it is clear that all liabilities in respect of the business which was being carried on have not been satisfied or otherwise provided for it would be open to the Government, under section 33 of the Act to require the insurer to take such action as they may think fit in respect of any matter arising out of the report of the controller after investigation into its affairs.

Appeal under clause 15 of the Letters Patent against the Order of the Hon'ble Mr. Justice Balakrishna Ayyar, dated 15th July, 1958 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P.No. 922 of 1957 presented under Article 226 of the Constitution of India to call for the records in No. 54-IE (1) of 1957 dated 17th September, 1957, on the file of the Government of India Department of Insurance and to issue a writ of prohibition to forbear the 1st Respondent from carrying on any investigation against the petitioner purporting to be under section 33 of the Insurance Act under orders of the 2nd Respondent.

G. R. Jagadisan and *T. S. Srinivasan*, for Appellant.

The Government Pleader (*B. V. Viswanatha Iyer*), for Respondents.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This is an appeal against the judgment of Balakrishna Ayyar, J., dismissing a petition filed by the appellant (Writ Petition No. 922 of 1957) under Article 226 of the Constitution in the following circumstances. The appellant, The Vanguard Fire and General Insurance Company, Limited, was incorporated in Madras on 25th September, 1941, under the Indian Companies Act, 1913. The object *inter alia* of the said company was to carry on fire, motor, marine, accident and other general insurance business. It is common ground that the company was bound by the provisions of the Insurance Act, 1938. In accordance with the requirements of that Act, the company applied for and obtained certificate of registration for carrying on the aforesaid classes of insurance business The necessary deposit to be made under section 7 of that Act was also made. At an extraordinary general meeting of the shareholders of the company held on 15th October, 1956, the following resolutions were passed.

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* Writ Appeal No. 67 of 1958. 16th January, 1959. 26th Pausa Saka, 1880.

"Resolved that the company forthwith cease to carry on the business as Insurers in respect of Fire, Motor, Marine and Accident and other General Insurance business.

Resolved that the Board of Directors of the Company be and are hereby instructed to stop the carrying on the business of insurers in all the Branches of the said business and not to issue any policy of insurance, cover-notes or other contracts of insurance from and after this date.

Resolved that the Board of Directors be and are hereby instructed that the company shall hereafter carry on the business of money-lending as a loan company and also to do investment business.

Resolved that the Directors be and are hereby authorised and instructed to notify the Controller of Insurance that this company has with effect from this date ceased to carry on the business of insurers and on the expiry of the present licences of insurers, not to apply for renewal thereof."

The company informed the Controller of Insurance by its letter dated 10th December, 1956, of the resolution ceasing to carry on the business of insurance and intimated that it could not therefore apply for renewal of registration. On 14th May, 1957, the Controller of Insurance gave notice to the company that as the company had failed to have its registration renewed for the year 1957, the certificates of registration bearing Nos. 380 and 380/2, dated 14th March, 1944 and 23rd August, 1944, respectively granted to the company under section 3 of the Insurance Act were cancelled with effect from 1st July, 1957, under sub-section (4) of that section. The notification of cancellation of registration of the company was also published in the *Government of India Gazette*, dated 22nd July, 1957. On 17th July, 1957, the Government of India, Ministry of Finance, passed the following order :

"In exercise of the powers conferred by sub-section (1) of section 33 of the Insurance Act, 1938 (IV of 1938), the Central Government hereby directs the Controller of Insurance to investigate the affairs of the Vanguard Insurance Company, Ltd., and the Vanguard Fire and General Insurance Company, Ltd., Madras, and to report to the Central Government on the investigation made by him".

Forwarding a copy of this order, the Controller of Insurance intimated to the appellant company that he had appointed Messrs. Fraser & Ross, Madras, as the auditors to assit him in the investigation and demanded a deposit of a sum of Rs. 2,500 provisionally in respect of the fees of the auditors and called upon the company to give the auditors all information and facilities they may require for the investigation. Acknowledging this letter the company replied to the Controller of Insurance submitting that the action taken by the Controller purporting to be under section 33 of the Insurance Act upon a direction from the Central Government was without jurisdiction and not warranted by the provisions of the Act because the company was not an insurer within the meaning of the Act, having ceased to carry on the business of insruance in accordance with the resolution dated 15th October, 1956. The answer of the Controller to this objection was as follows :

"With reference to your letter dated the 9th October, 1957, on the above subject, I have to invite a reference to the provisions of section 20 of the Insurance Act, 1938 and to say that even though the registration of the Company for transacting Fire, Marine and Miscellaneous Classes of insurance business stands cancelled and the company has stopped transacting new insurance business, it is subject to all the provisions of the Act as long as the liabilities in respect of the existing business are not fully satisfied or otherwise provided for. In the circumstances the company should comply with the requirements of this Department's letter of even number dated the 17th September, 1957, without any further loss of time."

Thereupon the appellant company filed the writ petition out of which this appeal arises praying that this Court may issue a writ of prohibition or any other appropriate writ, direction or order to forbear Messrs. Fraser & Ross from carrying on any investigation against the company purporting to be under section 33 of the Insurance Act under order of the Controller of Insurance. The main ground on which the writ was sought was that the appellant was not an insurer within the meaning of the Act from the moment it ceased to carry on insurance business in pursuance of the resolution passed at the Extraordinary General Meeting dated 15th October, 1956, mentioned above. Balakrishna Ayyar, J., held that the appellant company must be deemed to be an insurer within the meaning of the Act and dismissed the writ petition. Hence this appeal. Before dealing with the contentions and arguments put forward before us, it will be useful to refer to the provisions of the Insurance Act which have a material bearing on the questions which arise in this appeal.

Section 2 (9) defines *inter alia* "insurer" as

"any body corporate (not being a person specified in sub-clause (*c*) of this clause) carrying on the business of insurance, which is a body corporate incorporated under any law for the time being in force in the States : or stands to any such body corporate in the relation of a subsidiary company within the meaning of the Indian Companies Act, 1918, as defined by sub-section (2) of section 2 of that Act...."

Section 2-D which was inserted by the Insurance (Amendment) Act, 1939, runs thus:

"Every insurer shall be subject to all the provisions of this Act in relation to any class of insurance business so long as his liabilities in the States in respect of business of that class remain unsatisfied or not otherwise provided for".

Of the grounds on which the Controller can cancel registration of an insurer either wholly or in so far as it relates to a particular class of insurance business it is sufficient to refer to one of them, namely section 3 (4) (*f*) :

"If the insurer makes default in complying with, or acts in contravention of any requirement of this Act or of any rule or order made thereunder..."

Section 3 (5-B) declares the effect of cancellation of registration thus :

"When a registration is cancelled the insurer shall not, after the cancellation has taken effect enter into any new contracts of insurance, but all rights and liabilities in respect of contracts of insurance entered into by him before such cancellation takes effect shall, subject to the provisions of sub-section (5-D), continue as if the cancellation had not taken place."

Where the registration of an insurance company is cancelled under sub-section (4) of section 3, the Controller may, after the expiry of six months from the date on which the cancellation took effect, apply to the Court for an order to wind up the insurance company, or wind up the affairs of the company in respect of a class of insurance business, unless the registration of the insurance company has been revived under sub-section (5-C) or an application for winding up the company has been already presented to the Court section 3 (5-D). Section 7 provides for the deposit in cash, or in approved securities estimated at the market value of the securities, on the day of the deposit, or in both, with the Reserve Bank of India, of amounts specified for each class of insurance business. Any deposit made under section 7 will be deemed to be part of the assets of the insurer, but it shall not be available for the discharge of any liability of the insurer other than the liabilities arising out of policies of insurance issued by the insurer so long as any such liabilities remain undischarged.

Nor shall it be liable to attachment in execution of any decree except a decree obtained by a policy-holder of the insurer in respect of a debt due upon a policy, which debt the policy-holder has failed to realise in any other way. (Section 8 (1)). Where an insurer has ceased to carry on any class of insurance business in respect of which a deposit has been made under section 7 and his liabilities in respect of business of that class have beeen satisfied or otherwise provided for, the Court may, on the application of the insurer, order the return to the insurer of so much of the deposit as does not relate to the classes of insurance, if any, which he continues to carry on (section 9 (1)). Section 10 (1) of the Act requires the insurer carrying on business of more than one class of insurance to keep a separate account of all receipts and payments in respect of each such class of insurance business. Section 33 of the Act, the application of which is the main point in controversy, in so far as it is material for the disposal of this appeal, runs as follows :

"*Section* 33 (1).—The Central Government may at any time, by order in writing, direct the Controller or any other person specified in the order to investigate the affairs of any insurer and to report to the Central Government on any investigation made by him.

Provided that the Controller or the other person may, wherever necessary, employ an auditor or actuary or both for the purpose of assisting him in any investigation under this section.

(2) It shall be the duty of every manager, managing director or other officer of the insurer to produce before the person directed to make the investigation under sub-section (1) all such books of account, registers and other documents in his custody or power and to furnish him with any statements and information relating to the affairs of the insurer as the said person may require of him within such time as the said person may specify.

(4) On receipt of any report under sub-section (1), the Central Government may, after givin such opportunity to the insurer to make a representation in connection with the report as, in th opinion of the Central Government, seems reasonable, by order in writing, (*a*) require the insure

to take such action in respect of any matter arising out of the report as the Central Government may think fit, or

(*b*) direct the Controller to cancel the registration of the insurer ; or

(*c*) direct the Controller to apply to the Court for the winding up of the insurer, if a company, whether the registration of the insurer has been cancelled under clause (*b*) or not.

(5) No order made under this section other than an order made under clause (*b*) of sub-section (4) shall be capable of being called in question in any Court.

The contention of Mr. Jagadisa Ayyar, learned counsel for the appellant company, is that an order under section 33 of the Act can be passed only in respect of the affairs of an insurer, and the appellant is not an insurer because on the date of the order of the Government the company was not carrying on the business of insurance. Not only had the company resolved on 15th October, 1956, not to do any further insurance business, its registration had also been cancelled by the Controller with effect from 1st July, 1957. He relied on the provisions of section 3 (5-B) that when a registration is cancelled the insurer shall not after the cancellation has taken effect enter into any new contracts of insurance. The mere fact that there may be outstanding liabilities in respect of policies issued before the cancellation would not in law amount to carrying on of business. In support of his contention he cited certain decisions under the Income-tax Act, namely, *The Liquidators of Pursa, Ltd.* v. *Commissioner of Income-tax*[1], *Narain Swadeshi Weaving Mills* v. *Commissioner of Excess Profits Tax*[2] and *Estate of Lala Shankar Shah* v. *Commissioner of Income-tax*[3]. He pressed upon us the following observations in the last mentioned case at page 509 :

"Counsel for the Department has further urged that inasmuch as outstandings of the money-lending business were realized by the executors, they should be taken to have carried on the business of money-lending too. It is, however, conceded by him that beyond realizing the outstanding debts, nothing further was done by the executors and no new loans were advanced. In these circumstances, we do not consider that it can be reasonably argued that in merely collecting the outstanding dues, any business of money-lending was being carried on by the executors."

We do not think that the above observations and the decisions cited offer us much assistance. The phrase "carry on business" occurs in several enactments and has to be construed according to the context in which it is used and the general tenor of the enactment in which it occurs. It may be construed in one way for the purpose of section 20 of the Code of Civil Procedure and in a different way for purpose of income-tax. Equally unhelpful are the decisions cited by learned Government Pleader to support his contention that so long as there are liabilities still remaining, there would be a carrying on of business. *Smith* v. *Anderson*[4], and *Central India Mining Company* v. *Societe Coloniale Anversoise*[5]. The following observations of Bankes, L.J., at page 767 in *Central India Mining Company* v. *Societe Coloniale Anversoise*[5].

"But it must also be true that the appellants had made such arrangements as were necessary to enable the collection of debts and the discharge of liabilities to go on",

must be taken along with the circumstance in that case, that there was an intention to continue the business as soon as it was possible. In our opinion the question must be decided on the meaning given to insurance business in the Act itself. Section 2 (6-A) defines fire insurance buisness as the business of *effecting contracts of insurance* against loss by or incidental to fire and clause (11) defines life insurance business as the business of *effecting contracts of insurance* upon human life, and miscellaneous insurance business is defined as the business of *effecting contracts* of insurance which is not principally or wholly of any kind or kinds included in previous clauses. The Act therefore means by insurance business, effecting contracts of insurance. When the definition of "insurer" in section 2 (9) (*b*) refers to any body corporate carrying on the business of insurance, the implication is that the body corporate is effecting contracts of insurance. Admittedly once there has been a cancellation of registration, the company cannot effect any new contracts of insurance. We cannot, there-

1. (1954) S.C.J. 294 : 1954 S.C.R. 767 : 25 I.T.R. 265 (S.C.).
2. (1955) S.C.J. 30 : (1955) 1 S.C.R. 952 : 26 I.T.R. 765 (S.C.).
3. 1945 I.T.R. 500.
4. 50 L.J. Ch. 39.
5. L.R. (1920) 1 K.B. 753.

fore, agree with the learned Government Pleader that a company can be deemed to be carrying on business within the meaning of that expression in section 2 (9) of the Act even after there has been a cancellation of registration. We may add that the Government and the Controller never appear to have taken up the position that the appellant company was carrying on business after its registration had been cancelled because there were certain liabilities outstanding.

It now remains to consider the scope of section 2-D. The contention of Mr. Jagadisa Ayyar was that the word "insurer" in that section should be construed strictly according to the definition of "insurer" in section 2 (9), with the result that nobody could be deemed to be an insurer even for the purpose of section 2-D after the body had ceased to carry on new business. He would limit the application of section 2-D to the particular case where a corporate body was originally carrying on insurance business of several classes but subsequently it ceased to carry on one or more of such classes of insurance business, though continuing to carry on other classes of business. In such a case the body could be described as carrying on insurance business though the body had ceased to carry on business of a particular kind, because it was continuing to carry on insurance business of other kinds. We are unable to agree with this contention. Undoubtedly when a term is defined in an enactment, wherever that term occurs, the definition would ordinarily apply ; but there is a well-known canon of construction that in certain circumstances when a strict adherence to the rule would lead to an anomaly or repugnance, the rule would apply only when there is nothing repugnant to it in the context. Section 2 of the Act, which is the definitions section, opens with the words "unless there is anything repugnant in the subject or context". Blackburn, J., said in *R.* v. *Ramsgate*[1].

> "It is, I apprehend, in accordance with the general rule of construction that you are not only to look at the words, but you are to look at the context, the collocation and the object of such words relating to such matter, and interpret the meaning according to what would appear to be the meaning intended to be conveyed by the use of the words under the circumstances."

Craies draws from this rule the following inference :

> "It follows from the rule thus variously stated that all statutory definitions or abbreviations must be read subject to the qualification, variously expressed, in the definition clauses which create them, such as : 'unless the context otherwise required' ; or 'unless a contrary intention appears' ; or 'if not inconsistent with the context or subject-matter'."[2]

The word "insurer" occurs in several sections of the Act but it is obvious that in every place where it is used it would be anomalous to import the definition contained in section 2 (9) (*b*) in its entirety. For instance section 9 (1) of the Act which provides for the refund of the deposit made under section 7 says :

> "Where an insurer has ceased to carry on in the States, any class of insurance business in respect of which a deposit has been made under section 7..."

If we import the definition of 'insurer' as it is, there would be a contradiction in terms. A body which has ceased to carry on a business cannot be a body carrying on the business. Section 55 (1) provides that in the winding up of an insurance company or in the insolvency of any other insurer, the value of the assets and liabilities of the insurer shall be ascertained. In such a contingency there can be no question of any body carrying on insurance business. Nevertheless the word used is 'insurer' (*vide* also section 56).

In our opinion, the term insurer in section 2-D must in certain circumstances be also understood as a body corporate which had been carrying on insurance business. In this connection we may refer to the provisions of section 3 (5-B) under which even though registration is cancelled, still in respect of the contracts of insurance entered into before the cancellation the rights and liabilities continue *as if the cancellation had not taken place.* Notionally the insurer would be deemed to be carrying on business for the specific purpose. In the same way, section 2-D provides that the person who has been doing any class of insurance business but has ceased to do that class of business would nevertheless be subject to all the provisions of the Act so long

1. (1827) 6 B. & C. 712 at 717 : 108 E.R. 613. 2. (Craies on Statute Law, 5th edition).

as his liabilities in respect of that particular business remain unsatisfied, or not otherwise provided for.

Mr. Jagadisa Ayyar made an attempt to get out of section 2-D by contending that it cannot be said that the liabilities of the appellant are not otherwise provided for, when there was the deposit made by it under section 7. He, however, had to concede that there was nothing to show that a definite provision had been made for the discharge of particular liabilities remaining unsatisfied, say by constituting a fund or otherwise. He also contended that it is only when the Government is convinced that the liabilities remain unsatisfied or not otherwise provided for that the appellant can be deemed to come within the scope of section 2-D, and there was no finding by the Government to that effect on record. We are unable to agree with this contention. There is sufficient material from which it is clear that all liabilities in respect of the business which was being carried on have not been satisfied or otherwise provided for.

Mr. Jagadis Ayyar next urged that even after investigation and on receipt of the report on such investigation, all that the Central Government could do was one of three things specified in clauses (*a*), (*b*) and (*c*) in section 33 (4) of the Act. As the resgistration had been cancelled, it would be unnecessary to invoke clause (*b*). Under section 3 (5-D) when the registration is cancelled, the Controller may, after the expiry of six months from the date on which the cancellation took effect, apply to the Court for an order to wind up the insurance company. So it was not necessary to rely upon clause (*c*). So far as clause (*a*) was concerned, there could be no direction because there was no insurer, as the business had ceased to be carried on. So his argument ran. It is true that clause (*b*) need not be invoked because the registration had been cancelled ; but the Central Government could take action under clauses (*a*) and (*c*). No doubt under section 3 (5-D) the Controller himself may apply for winding up ; but this provision is not inconsistent with the provision which enables the Government to direct the Controller to make an application for winding up if they think that it would be desirable to do so on a perusal of the report on the investigation. As we have already held that the word insurer need not always mean a body carrying on insurance business and may include a body which had been carrying on business, it would be open to the Central Government under clause (*a*) to require the insurer to take such action as they may think fit in respect of any matter arising out of the report.

We therefore hold, agreeing with Balakrishna Ayyar, J., that the order passed by the Central Government under section 33 of the Act was valid though it was passed after the cancellation of registration. The appeal fails and is dismissed with costs. Advocates fee Rs. 150.

V.S. ——— *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR, MR. JUSTICE RAMACHANDRA IYER AND MR. JUSTICE SUBRAHMANYAM.

Udaya Limited, Madras .. *Applicant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), section 24—Scope—Setting off loss against profits in computing aggregate income—Ascertainment and determination of the loss.

The assessee submitted a return of income for the first time only in 1951 on which year it submitted the returns relating to 1948-49, 1949-50, 1950-51, and later on in November the return

* Case Referred No. 62 of 1954. 23rd April, 1959. (21st July, 1958).

for 1951-52. The Income-tax Department accepted the return for 1950-51 and 1951-52 but ignored the returns for the two earlier years. The assessee claimed that it was entitled to carry forward the losses which it had incurred in the earlier years and set them off against the profits made in the subsequent years and for this purpose the losses should be ascertained and determined.

Held, section 24 (2) of the Income-tax Act at the relevent period entitled the assessee to carry foward his losses for a period of six years if the assessee had more heads of income than one. The words of the section do not justify the requirement that before the assessee can carry forward the losses the amount of the loss should be ascertained and determined and this ascertainment and determination should have been made by the Department anterior to the time when the claim to carry forward the losses and set them off against subsequent profits are made.

Under section 22 before it was amended, a person whose income in a particular year was below the assessable limit was not bound to submit a return and even if a return was submitted the Income-tax Officer was not bound to deal with it. So an assessee who had made no profits at all but had on the contrary incurred a loss would have had no right either to submit a return showing the losses or to insist that the amount of his losses should be ascertained and determined by the officer. The assessee is entitled to have the losses determined and carry forward the losses so determined to be set off against the profits made in subsequent years when the claim is made under section 24 of the Act.

Ahmed Sahib v. *Commissioner of Income-tax*, (1952) 2 M.L.J. 282, overruled.

Case referred to the High Court by the Income-tax Appellate Tribunal, Madras, under section 66 (1) of the Indian Income-tax Act, 1922 (Act XI of 1922), in R.A., Nos. 231 to 234 of 1953-54 (I.T. Nos. 2587 to 2590 of 1952-53—Assessment years 1948-49, 1949-50, 1950-51 and 1951-52) on its file for decision on the following questions of law, *viz* :—

" Whether losses claimed by the assessee for assessment years 1949-50 require in law to be determined therefor and carried forward to be set off against its assessments for 1950-51 and 1951-52.

G. R. Jagadisan and *R. Venkataraman*, for Applicant.

C. S. Rama Rao Sahib, Special counsel for Income-tax on behalf of the Respondent.

The Order of the Court (*Rajagopalan and Balakrishna Ayyar, JJ.*) referring the question to a Full Bench was made by

Balakrishna Ayyar, J.—Under section 66 (1) of the Indian Income-tax Act the Income-tax Appellate Tribunal of Bombay has referred the following question for the decision of this Court :

"Whether losses claimed by the assessee for assessment years 1948-49 and 1949-50 require in law to be determined therefor and carried forward to be set off against its assessments for 1950-51 and 1951-52?"

The relevant facts are these. The assessee is a private limited company deriving income from three heads or sources, *viz.*, interest on securities, dividends from companies and its business in shares and stocks. During the year, 1948-49 it received Rs. 18,000 by way of interest on securities, Rs. 13,084 by way of dividends from companies and sustained a loss of Rs. 1,32,607 in its business. During the year, 1949-50 it received Rs. 3,000 as interest on securities, Rs. 7,795 as dividends from companies and sustained in its business a loss of Rs. 35,252. During the year, 1950-51 it derived a net aggregate income of Rs. 13,611. We may mention here that there is some discrepancy between the figures set out in the statement of the case submitted by the Tribunal and the figures appearing in an order of the Appellate Assistant Commissioner of Income-tax. The assessee submitted a return of income for the first time only on 29th March, 1951 on which date it submitted the returns relating to the years, 1948-49, 1949-50 and 1950-51. In November, 1951, the company submitted a fourth return showing the income for the year 1951-1952. The total income was then shown as Rs. 34,269. The Income-tax Officer accepted the returns filed for the year 1950-1951 and 1951-1952 but he ignored the returns for the two earlier years 1948-1949 and 1949-1950. The assessee appears to have claimed before the Income-tax Officer that it was entitled to carry forward the losses which it had incurred in 1948-1949 and 1949-1950 and set them off against the profits for the subsequent years. That claim was negatived by the Income-tax Officer. He, however, ordered refund of the excess tax deducted at the source under section 48 of the Act. From the order refusing the claim to set off the assessee appealed to the Appellate Assistant Commissioner of Income-tax who dismissed the appeal. That officer observed :

"I am unable to accept the claim of the appellants since it has no legal basis. The returns showing heavy business losses for the years 1948-49 and 1949-50 were not filed in the relative assessment years. They were submitted long after, about the close of the assessment year, 1950-51".

He also remarked that the returns had been submitted voluntarily. Dealing with section 24 (1) of the Act he observed :

"This sub-section thus applies only to an assessee and the term 'assessee' has been defined in section 2 (2) as a person by whom income-tax is payable. The use of the present tense in the definition indicates that the person should have been an assessee for the year of assessment in respect of which the loss was claimed. Thus the question of the determination of the loss and the set off of such loss against any income of the other heads mentioned in section 6 would therefore arise only in the course of assessment relating to that year."

Finally, he remarked :

"I do not find any provision in law by which the appellant could compel the Income-tax Officer to take cognisance of the losses sustained in the previous years regarding which no return of income was filed either voluntarily during the relative financial year or no return was called for by the Income-tax Officer acting under the provisions of section 22 (2) or 34".

The Appellate Tribunal dismissed the appeal that the assessee filed before it. It however agreed with the contention of the assessee that a question of law did arise and so has submitted the question quoted above for the determination of this Court.

The provisions of the Act that are here relevant are to be found in section 24 as it stood before it was amended in 1953 and 1955. That section so far as is now material, ran as follows :—

"24 (1). Where any assessee sustains a loss of profits or gains in any year under any of the heads mentioned in section 6, he shall be entitled to have the amount of the loss set off against his income, profits or gains under any other head in that year."

(The *Provisos* and *Explanation* are omitted). Sub-section (2) ran as follows :

"Where any assessee sustains a loss of profits or gains in any year, being a previous year not earlier than the previous year for the assessment for the year ending on the 31st day of March, 1940, under the head 'profits and gains of business, profession or vocation,' and the loss cannot be wholly set off under the sub-section (1), the portion not so set off shall be carried forward to the following year and set off against the profits and gains, if any, of the assessee from the same business, profession or vocation for that year ; and if it cannot be wholly so set off, the amount of loss not so set off shall be carried forward to the following year, and so on ; but no loss shall be so carried forward for more than six years, and a loss arising in the previous years for the assessment for the years ending on the 31st day of March, 1940, the 31st day of March, 1941, the 31st day of March, 1942, the 31st day of March, 1943, and the 31st day of March, 1944, respectively, shall be carried forward only for one, two, three, four and five years, respectively."

Sub-section (3) ran as follows :—

"When, in the course of the assessment of the total income of any assessee, it is established that a loss of profits or gains has taken place which he is entitled to have set off under the provisions of this section, the Income-tax Officer shall notify to the assessee by order in writing the amount of the loss as computed by him for the purposes of this section".

Mr. Jagadisa Ayyar, the learned advocate for the petitioner, argued : The assessee in the present case had three sources or heads of income within the meaning of section 6 of the Act, *viz.*, dividends, interest on securities and business. By virtue of the provisions contained in sub-section (1) of section 24, the assessee is entitled to set off the losses under one head against the income or profits from another head. If the entire loss is not thus absorbed sub-section (2) gives the assessee the right to carry forward the loss from business to another year and set it off against the profits that he might subsequently make. A further limitation on this right of the assessee is that he cannot carry the loss forward for a longer period than six years. Where the assessee has suffered a net loss in a particular year there would be no question of assessing him to tax in respect of that year because his income would have been not merely nil but a negative quantity. In order to enable the assessee to carry forward his loss and set it off against the profits of future years and in order to avoid disputes at a subsequent point of time the assessee is entitled to insist that the Income-tax Officer should ascertain this loss. That the returns of the income were filed voluntarily, or, that they were not filed in the year following the account year, are not circumstances that would deprive the assessee of this right

of his. The Income-tax Officer was bound to ascertain the losses which the assessee had suffered and set them off against the profits it had earned in 1950-1951 and 1951-1952.

In support of this contention of his, Mr. Jagadisa Ayyar referred to *Income-tax Commissioner* v. *Govindalal*[1]. The facts there are summarised in the first paragraph of the judgment of the learned Chief Justice :

" On the 4th September, 1951, one Govindalal Dutta, an owner of a tea business, filed voluntary returns of his income in respect of five consecutive years. Those were assessment years 1946-47 to 1950-51. Of the returns so filed, that for the assessment year 1946-47 showed a loss of Rs. 37,925-2-9 and that for 1947-48 showed a loss of Rs. 36,033-15-0 while that for the year 1948-49 showed a paltry profit of Rs. 75-3-3. In making assessments on these returns, the Income-tax Officer paid no attention to the returns for 1946-47 and 1947-48. The first return to be dealt with was the return for the year 1948-49 and on that return he made an assessment on an income of Rs. 5,545."

In paragraph 12 the question for determination was thus posed :

" The question, before us, is whether in view of the provisions of section 24 (2), the assessee was entitled to have his claim of losses during the two earlier years examined and to be given the benefit of those losses in his assessment for 1948-49, if the losses claimed were made out ".

The department contended that the Income-tax Officer was not bound even to determine for purpose of section 24 (2) whether there had been any losses during the earlier years which the assessee was entitled to carry forward and set off against subsequent profits because section 24 (2) did not apply to losses during the years for which there had been no assessment. It was contended on behalf of the department that such a construction of section 24 (2) was implicit in the use in the sub-section of the word " assessee " as its definition stood at the relevant date. (It will be recalled that this is one of the grounds on which the Appellate Assistant Commissioner rested his conclusion.)

Dealing with this argument the Court observed :

" The contention thus put forward on the basis of the word " assessee " is plainly untenable and it is only fair to Mr. Meyer to say that, after some discussion be himself conceded that it could not be correct."

The learned Chief Justice then quoted sub-section (3) of section 24 and observed:

" It will be noticed that the section speaks of a loss being established in the course of the assessment of an assessee and the loss contemplated is a loss of profits or gains which the assessee is entitled to have set off under the provisions of the section. Under the provisions of sub-section (2) of the section, an assessee is entitled to have his business loss carried forward and set off against subsequent profits from the same business for six years. I can see no reason to hold that the loss contemplated by sub-section (3) is not the whole loss of all those six years, or any or more of the years within that period. Sub-section (3) in speaking of loss which an assessee is entitled to have set off under the provisions of the section, adds no qualification and obviously has in view all the loss which under the terms of the section, an assessee is entitled to have carried forward. If that be so, then the assessee in the present case was entitled in the course of his assessment for the year 1948-49 to try to establish, if he could, that a loss had been suffered by him within the six preceding years and that it had not been possible to set off such loss against the profits of the respective years, nor had it been possible to set off the business part of the loss against the profits from the same business of subsequent year ".

Later he added :

" The Income-tax Officer was, however, required, since a claim of set off of earlier loss had been made before him, to investigate into the claim and see if it was established that losses had taken place in the two earlier years which the assessee was entitled to have set off under the provisions of section 24 (2)."

A similar view was taken in *All-India Groundnut Syndicate, Ltd.* v. *Commissioner of Income-tax*[2]. In that case the learned Chief Justice observed :

" It is clear that this sub-section section 24 (3) casts a duty upon the Income-tax Officer. The duty is that he has to compute the loss and notify the loss to the assessee. This sub-section was clearly enacted in order to crystallise the loss in any particular year of assessment, to leave no dispute with regard to that loss and to give notice to the assessee of the amount at which the loss was computed by the Income-tax Officer. But the right which the Legislature confers upon the assessee does not arise under this sub-section but it arises under sub-section (2) and that right is to carry forward the

1. A.I.R. 1958 Cal. 195 : 33 I.T.R. 630. 2. (1954) 25 I.T.R. 90.

loss of the previous years for a period of six years and that right is an absolute unqualified right and that right is not made conditional upon any computation made by the Income-tax Officer or any notice issued by the Income-tax Officer. Therefore, whereas the right is conferred under sub-section (2) of section 24, sub-section (3) is merely a machinery or procedural section which provides how and when the Income-tax Officer should compute the loss and how he should communicate the loss to the assessee ".

Again at page 101 the learned Chief Justice observed :

" The right to claim a relief which the assessee is claiming only arose to the assessee in the assessment year 1948-49 when the assessee had made profits and sought to set off the losses incurred during the previous years against the profits. The fact that the Income-tax Officer has not computed the loss of the earlier years can have no bearing upon the right of the assessee which arises in the year 1948-49. There is nothing to prevent the Income-tax Officer from computing those losses which the assessee may have incurred earlier and which he has failed to do ".

The Bombay decision was followed by a Bench of the Nagpur High Court in *Seth Kushalchand Daga* v. *Commissioner of Income-tax*[1]. At page 426 some of the observations of Chagla, C.J., were quoted with approval.

A Bench of this Court, however, has taken an entirely different view. The case is reported in *Ahamed Sahib* v. *Commissioner of Income-tax.*[2] The facts there were as follows. The assessee carried on a business in yarn and cloth in Melapalayam, Tirunelveli district. On 15th August, 1943, the Income-tax Officer sent him a notice under section 22 (2) of the Act calling upon him to make a return of his income for the assessment year 1943-44. On 21st September, 1945, the Income-tax Officer sent him a notice under section 34, read with section 22 (2) calling upon him to file a return of his income for the assessment year 1942-1943. In pursuance of this notice the assessee filed a return for the year 1942-1943 showing a loss of Rs. 7,875. The Income-tax Officer called for and examined the accounts of the assessee and closed the proceedings with a note showing that the income was nil. That was not communicated to the assessee. The assessment for the year 1943-1944 was completed on 31st March, 1946, and at that stage the assessee was not permitted to set off the loss of the previous year ; the refusal was based on the ground that no assessment had been made in the previous years and so no loss had been determined. The Appellate Commissioner dismissed the appeal which the assessee filed before him. The Tribunal also held that the claim to set off was not admissible. This Court observed :

" To claim therefore the benefit of section 24 (2) it must be established that there was a loss which was already ascertained but which could not be completely wiped out by setting it off against the profits under a different head under section 24 (1) and that there was a balance which was carried forward to the subsequent year. The balance of loss therefore contemplated under section 24 (2) is an ascertained balance and not an undetermined balance. Where a right is claimed under section 24 (2) the question therefore of ascertaining the loss of a previous year would never arise and cannot arise and therefore there would be no duty where a right under section 24 (2) exists compelling the Income-tax Officer to determine the loss of the previous assessment year.

* * * * * *

Section 24 (3), in our opinion, does not help the assessee in his claim that he is entitled to the benefit of section 24 (2) and to compel the Income-tax Officer to determine the loss of the previous assessment year 1942-43. The policy underlying the provisions of the Income-tax Act is that generally there is no case where during a given assessment year the revenue authorities are called upon to determine either the loss or the income of the previous year except to the limited extent recognisable under section 34 of the Act. It is, therefore, difficult to accept the contention that under section 24 (3) the Income-tax Officer was bound to determine during the assessment year 1943-44 the loss which accrued to the assessee in the accounting year corresponding to the assessment year 1942-43."

A Bench of the Andhra High Court followed the decision in *Ahamed Sahib* v. *Commissioner of Income-tax*[2] and distinguished the Bombay case on the ground that that decision proceeded on the principle that a person who committed default cannot take advantage of it to deprive the other of his rights. Vide *Narasimhalu* v. *Commissioner of Income-tax*[3].

It is necessary to refer to one other case that was cited before us. That is reported in *Anglo-French Textile Co., Ltd.* v. *Commissioner of Income-tax*[4]. The facts

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1. (1957) 31 I.T.R. 417.
2. (1952) 2 M.L.J. 282 : 22 I.T.R. 87.
3. (1956) An.W.R. 1039 : 32 I.T.R. 728.
4. (1953) 1 M.L.J. (S.C.) 385 : (1953) S.C.R. 448 : (1953) S.C.J. 101.

there were as follows. The assessee was the Anglo-French Textile Company, Ltd., a company incorporated in the United Kingdom. It owns spinning and weaving mills at Pondicherry and manufactures yarn and cloth. It used to obtain its requirements of raw cotton mostly from Best & Company, Ltd., Madras. The bulk of the manufactured goods were sold in British India, the rest being sold elsewhere. In the year material to the case it had no business in India and accordingly it submitted no return to the Income-tax authorities. On 25th April, 1941, the Income-tax Officer issued a notice to the company and called for a return of its income. The company replied that at all material times it had no business in India and consequently no profits arose or accrued or were received in India and that therefore the assessee was not liable to comply with the provisions of the Indian Income-tax Act. Nevertheless and without prejudice the company submitted a nil return.

In March, 1942, the Income-tax Officer accepted the nil return and declared the company was not liable to tax. A year later the Income-tax Officer sent the company a notice under section 34 of the Act. In reply to this the assessee again submitted a nil return and filed a statement showing a loss of over Rs. Three lakhs on its total income. The Income-tax Officer accepted the statement of the company and added :

"Hence there is no assessment for 1941-42. As this is a non-resident company, the loss need not be carried forward under section 24 (2) as that section in terms does not apply to non-residents."

The company complained against the last portion of this order ; it insisted that the Income-tax Officer having accepted its statement of loss was bound to record it and carry it forward.

The appeals which the assessee filed before the Appellate Assistant Commissioner of Income-tax and the Income-tax Appellate Tribunal, both failed. The assessee obtained a reference to this Court and here also it failed. It finally went to the Supreme Court. That Court ruled :

"A set off under section 24 (1) can only be claimed when the loss arises under one head and the profit against which it is sought to be set off arises under a different head. When the two arise under the same head, of course the loss can be deducted but that is done under section 10 and not under section 24 (1)......In the present case, the loss is computed by striking a balance in the profit and loss account of just the one business and consequently no question of different heads arises. On both these grounds, therefore, the assessee's contention must fail because, unless the loss can be set off under sub-section (1) of section 24, it cannot be carried forward under sub-section (2) and if it cannot be carried forward the question of its determination and computation becomes irrelevant."

Earlier in the course of the judgment the Court observed :

"There is no provision in the Act which entitles the assessee to have a loss recorded or computed unless something is to be done with the loss."

This observation seems to suggest that where something has to be done with the loss as for instance setting it off against the profits of a subsequent period, the assessee can claim, subject of course to the other provisions of the Act, that the loss should be computed and ascertained.

We may here refer to the last argument which Mr. Jagadisa Ayyar urged. The assessee filed a refund application under section 48 of the Act. Rule 37 requires that such an application shall be accompanied by a return of total income and total world income in the form prescribed under section 22 unless of course such a return has already been filed. When such a return was filed it was the duty of the Income-tax Officer to scrutinise the return and if a loss was claimed in it, to compute how much it was ; a duty rested on him to ascertain the loss. If in this case the Income-tax Officer had discharged this duty the loss sustained by the assessee would have been ascertained and the requirements laid down in *Ahamed Sahib* v. *Commissioner of Income-tax*[1], complied with. The assessee cannot be penalised for the default or omission of the Income-tax Officer. So ran the argument.

We are unable to accept the contention of Mr. Jagadisa Ayyar that the Income-tax Officer is in every case bound to compute or quantify the loss which an assessee

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1. (1952) 2 M.L.J. 282 : 22 I.T.R. 87.

who has filed an application for refund under section 48 claims to have suffered. Of course, there may be cases where that may have to be done ; but that is not always so. When dealing with an application under section 48 the Income-tax Officer has only to satisfy himself that the tax paid by or on behalf of the assessee or treated as paid on his behalf exceeds the amount with which he is chargeable. Ordinarily it will suffice for the Income-tax Officer to scrutinise the return to a limited extent, that is to say, to the extent necessary to determine what the tax properly chargeable on the assessee is. When the examination of the return shows that the income is nil or that it is a negative quantity he is not bound to proceed further with his examination and ascertain how much the loss amounts to. It is not possible on this objection of Mr. Jagadisa Ayyar to say that the decision in *Ahamed Sahib* v. *Commissioner of Income-tax*[1], does not apply.

It is also possible to say that the decision in *Ahamed Sahib* v. *Commissioner of Income-tax*[1] and the decision in *Narasimhalu* v. *Commissioner of Income-tax*[2], which followed it are distinguishable on the facts from the present case. The assessee before us had three sources of income and therefore under the terms of sub-section (1) of section 24 it could set off the loss under one head against the income from another head. That will enable it to carry forward the loss under section 24 (2). In *Ahamed Sahib* v. *Commissioner of Income-tax*[1], the assessee had only one source of business, *viz.*, trading in yarn and cloth, and therefore he could not get the benefit of section 24 (1) and consequently of section 24 (2). In *Narasimhalu* v. *Commissioner of Income-tax*[2], also the assessee appears to have had only one source of business, *viz.*, the business of an abkari contractor. But then the assessee in *Income-tax Commissioner* v. *Govindalal*[3], also had apparently only one source of income.

The decisions are clearly in conflict—three are in one way and two in other way. In *Income-tax Commissioner* v. *Govindalal*[3], Chakravarti, C.J., expressly dissented from the view taken up by this Court in *Ahamed Sahib* v. *Commissioner of Income-tax.*[1]

We are inclined to take the view that the decision in *Ahamed Sahib* v. *Commissioner of Income-tax*[1], requires further examination and consideration and therefore, we refer to a Full Bench the entire question which the Income-tax Appellate Tribunal has referred to us. The papers will be placed before my Lord the Chief Justice for further directions.

In pursuance of the order of reference the case came on for hearing before the Full Bench (*Balakrishna Ayyar, Ramachandra Iyer* and *Subrahmanyam, JJ.*).

The Judgment of the Full Bench was delivered by

Balakrishna Ayyar, J.—The relevant facts have been set out in the order of reference to the Full Bench. All the decisions cited before us have also been referred to in it. There is no need to go over the same ground again and we shall therefore only give our reasons for the conclusion we have reached. These are in the main two.

Section 24 (2) of the Indian Income-tax Act, as it stood at the time relevant to these proceedings, entitled an assessee to carry forward his losses for a period of six years. There was only one limitation on that right, *viz.*, that imposed by the requirements of sub-section (1) which was that the assessee should have had more heads of income than one. If he satisfied this requirement and had more heads of income than one, he could carry forward his unadjusted losses for a period of six years. The decision of this Court in *Ahamed Sahib* v. *Commissioner of Income-tax*[1], which was followed by a Bench of the Andhra High Court in *Narasimhalu* v. *Commissioner of Income-tax*[2], proceeded not merely on the basis that before an assessee can carry forward his losses the amount of his losses should have been ascertained and determined, but that this ascertainment and determination should have been made by the department anterior to the time when the claim to carry forward the

1. (1952) 2 M.L.J. 282 : 22 I.T.R. 87.
2. (1956) An. W.R. 1039 : 32 I.T.R. 728.
3. A.I.R. 1958 Cal. 195 : 33 I.T.R. 630.

losses and set them off against subsequent profits are made. For imposing this latter requirement, we can see no justification in the words of the Statute.

There is next this further consideration. A person whose income in a particular year was below the assessable limit was not bound to submit a return, and, even if he submitted one, the Income-tax Officer was not bound to deal with it. Sub-section (2-A) was inserted in section 22 of the Income-tax Act only in 1953, that is to say, subsequent to the period we are dealing with and is not therefore applicable to the present case. So, an assessee who had made no profit at all but had on the contrary incurred a loss would have had no right either to submit a return showing the losses or to insist that the amount of his losses should be ascertained and determined by the Income-tax Officer. That being so, to say that before a loss can be carried forward it must have been previously ascertained and determined would, in effect, be to deprive the assessee of the right to carry forward the loss conferred on him by the Act. An assessee may have sustained losses for say five years running. In the sixth year he may have made a profit. But, since in respect of the years in which his business was running at a loss he was not entitled either to submit a return or to insist that the amount of his losses should be ascertained and determined by the Income-tax Officer, he would not—if the view taken in *Ahmed Sahib's Case*[1], were right—be entitled to have that loss carried forward and set off against any profit he might make in the sixth year. That would defeat the purpose of the provisions contained in section 24 which was and is to enable an assessee to carry forward his unadjusted losses and set them off against the profits of future years. We, therefore, think that the case of *Ahamed Sahib* v. *Commissioner of Income-tax*[1] was wrongly decided in this respect, and, overrule it. The assessee is entitled to have his losses—less those already adjusted for refund purposes—for the assessment years 1948-1949 and 1949-1950 determined and carry forward the loss so determined to be set off against the profits for the assessment years 1950-1951 and 1951-1952.

The assessee will be entitled to his costs. Advocate's fee Rs. 250.

V.S. *Reference answered in favour of the Assessee.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

J. Manicka Goundar .. *Petitioner**

v.

The Inspector of Factories .. *Respondent.*

Factories Act (LXIII of 1948), section 2 (k) (l) and (m)—"Factory"—Ingredients—"Worker" "Employed"—Meaning of—Manufacturing process—Decorticating groundnuts.

In the premises of a mill there was a 10 H.P. electric motor which was working a decorticator. The manufacturing process consisted in decorticating groundnuts, drying them and packing the kernels in gunny bags. There were eighteen persons working at the place, five of them being men and the rest women. There was no evidence let in to establish either that they received wages or were employed by or on behalf of the mill.

Held : Though there was no doubt that what was being done in the premises was manufacturing process, as defined by section 2 (*k*), Factories Act, (decorticating groundnuts), in the absence of evidence to show that the persons working were employed directly or through any agency, whether for wages or not, it could not be held that they were "workers" within the meaning of section 2 (*l*) and hence their presence in the premises would not make the place a "factory" as defined by section 2 (*m*) of the Factories Act.

To make a person a "worker", there must be a contract between the management and the person employed.

Chintaman Rao v. *State of Madya Pradesh*, (1958) S.C.J. 752 : 1958 S.C.R. 1340 : (1958) M.L.J. (Crl.) 569 (S.C.) : A.I.R. 1958 S.C. 388, relied on.

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1. (1952) 2 M.L.J. 282 : 22 I.T.R. 87. 2. (1956) An. W.R. 1039 : 32 I.T.R. 728.

*Crl. R.C. No. 531 of 1958. 9th December, 1958.
(Crl. R.P. No. 506 of 1958). (18th Agrahayana 1880, Saka).

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Court of the Sub-Divisional Magistrate, Tirupathur, in S.T.R. No. 12 of 1958, dated 8th May, 1958.

T. L. Nagaraja Rao, for Petitioner.

V. V. Radhakrishnan, for the Public Prosecutor (*P. S. Kailasam*) on behalf of the State.

The Court made the following

ORDER.—The accused in this case was convicted for an offence under section 6 read with rule 5 (3) and section 92 of the Factories Act, and, sentenced to pay a fine of Rs. 50 and was also further directed to pay a sum of Rs. 25 as licence fees.

The facts are these. On 18th November, 1957, at 9-15 A.M. P.W. 1, the Inspector of Factories, Vellore, inspected the premises in question. There was a 10 H.P. electric motor working. It was working the decorticator. The manufacturing process consisted in decorticating groundnuts, drying them and packing the kernels in gunny bags. There were 18 persons working at these various processes. Five were men and 13 were women.

Beyond this evidence there was no evidence let in to establish that either they received wages or were employed by or on behalf of the mills. In this state of evidence the only question that arises for consideration is whether it is a factory within the definition of section 2 (*m*) of the Factories Act, 1948. "Factory" is definied in section 2 (*m*) as meaning,

> "any premises including the precincts thereof—
>
> (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
>
> (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on, ..."

"Worker" is defined in section 2 (*l*) as meaning,

> "a person employed, directly or through any agency, whether for wages or not, in any manufacturing process, or in cleaning any part of the machinery or premises used for a manufacturing process, or in any other kind of work incidental to, or connected with, the manufacturing process, or the subject of the manufacturing process."

"manufacturing process" is defined in section 2 (*k*) :

> "manufacturing process" means any process for—
>
> (i) making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing, or otherwise treating or adapting any articles or substance with a view to its use, sale, transport, delivery or disposal, or
>
> (ii) pumping oil, water or sewage, or
>
> (iii) generating, transforming or transmitting power, or
>
> (iv) composing types for printing, printing by letter press, lithography, photogravure or other similar process or book-binding, or
>
> (v) constructing, reconstructing, repairing, refitting, finishing, or breaking up ships or vessels."

There can be no doubt that what was being done in the premises was manufacturing process because they were decorticating groundnuts. Though there is no evidence that the owner of the mill was selling them, still it was intended to be used by the persons who bring them for decorticating. The question is whether these 18 persons who were found there are "workers" within the meaning of section 2 (*l*). According to that definition it must be shown that they were persons employed directly or through any agency, whether for wages or not. "Employed" has been interpreted in various decisions and, as pointed out by Subba Rao, J., in *Chintaman Rao* v.

State of M.P.[1], there must be a contract between the management and the person employed so as to bring them within the definition of " worker ". That evidence is lacking in this case. The 18 persons are, therefore, not workers within the meaning of the definition, and, their presence in the premises will not make it a factory.

The offence is not made out. The conviction and sentence are set aside and the accused acquitted. The fine, if paid, will be refunded.

P.R.N. ——— *Revision allowed. Conviction and sentence set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

Dhanmull Sowcar .. *Petitioner* *

v.

The Regional Transport Authority, Salem and another .. *Respondents.*

Motor Vehicles Act (IV of 1939), *section* 60 (1), *Proviso—Procedure—Duty of Regional Transport Authority—Power and duty to examine witness named by person proceeded against—Permit-holder neither producing nor offering to produce witness—Failure to examine—If contravention of principles of natural justice—Bus operator carrying goods for freight collected by him—Offence.*

All that the Proviso to section 60 (1) of the Motor Vehicles Act requires is that before a permit is cancelled, the holder of the permit should be given an opportunity to furnish his explanation. The person proceeded against should be notified what the allegations against him are and he should be given an opportunity to explain them. The authorities are neither empowered nor required to examine any witness. The person proceeded against has no right to insist that his witness should be examined by the authorities when he is being proceeded against for a transgression of any of the matters enumerated in section 60 (1), he has much less reason to complain when he neither produces nor offers to produce his witness.

A failure to examine his witness under such circumstances would not amount to a contravention of the principles of natural justice, so as to warrant interference by a writ of *certiorari* under Article 226 of the Constitution of India.

Transport of goods which are not the luggage of passengers, by a bus operator and collection of freight therefor would be a contravention of the terms of the permit under section 60 (1) (*b*).

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in R. No.31079-A3056, dated 30th September, 1956, on the file of the State Transport Appellate Tribunal, Madras, confirming the Order of the Regional Transport Authority, Salem, dated 11th June, 1956, in R. No. A.-4-16583 of 1956 and qaush the said orders.

M. R. Narayanaswami, for Petitioner.

The Additional Government Pleader (*K. Veeraswami*), for Respondents.

The Court made the following

ORDER.—The petitioner had a stage carriage permit for his bus MDJ 1953. On 18th May, 1956, the Motor Vehicles Inspector, South Salem, stopped the vehicle at the 15th milestone on the Salem-Harur road, and checked it. He then found that the bus was carrying 49 passengers, excluding the driver and the conductor, while its authorised seating capacity was only 40 passengers. The bus was overloaded by nine passengers. In addition, it was found that thirty-one baskets of mangoes were being transported by that bus, for which freight charges had been collected at the rate of four annas per basket.

The Secretary to the Regional Transport Authority, Salem, called for the explanation of the petitioner in respect of these irregularities. In the explanation which the petitioner submitted, he stated that the allegation that there were forty-

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1. (1958) S.C.J. 753 : 1958 S.C.R. 1340 : (1958) M.L.J. (Crl.) 569 (S.C.) : A.I.R. 1958 S.C. 388.

* W.P. No. 194 of 1957. 27th February, 1959. (8th Phalguna, 1880, Saka).

nine passengers was untrue and that the bus carried only 40 passengers. He further mentioned that a constabe was travelling in that bus and that the constable should be examined in support of his explanation. He further pleaded that the charges had been brought against him purposely out of prejudice. So far as the baskets of mangoes were concerned, the explanation of the petitioner was that they constituted the luggage of certain passengers.

The Secretary, Regional Transport Authority, rejected the explanation tendered by the petitioner. He considered that there was no need to examine the constable, because that constable himself had signed the report drawn up by the Motor Vehicles Inspector. He rejected the plea that the mangoes constituted the luggage of certain persons, because not one of the passengers claimed it as his luggage. In the result, he suspended the permit of the petitioner for a period of 3 months for the offence of having overloaded the bus by nine passengers and for one week for the offence of having carried the baskets of mangoes.

On appeal, the State Transport Appellate Tribunal confirmed the findings of the Secretary, Regional Transport Authority, but reduced the period of suspension from 3 months to 1 month in respect of the offence of overloading. He confirmed the punishment in respect of the other offence.

The petitioner has now come to this Court for the issue of an appropriate writ to quash the orders of the authorities below.

The first contention of Mr. M. R. Narayanaswami, the learned counsel for the petitioner, was that the Secretary of the Regional Transport Authority contravened the principles of natural justice when he declined to take the evidence of the constable whom the petitioner had cited as a defence witness.

The authorities proceeded against the petitioner for contravention of clause (*b*) of section 60 (1) of the Motor Vehicles Act. Sub-section (1) of section 60 enumerates six categories of matters and provides that, should a contravention occur in respect of any of these, the permit may be cancelled or suspended for such period as the appropriate authority deems fit. There is a proviso to this which runs:

"Provided that no permit shall be cancelled, unless an opportunity has been given to the holder of the permit to furnish his explanation."

It will be noticed that this section does not require that the authorities concerned should record any evidence. Therefore, it is not possible to say that, when the Secretary of the Regional Transport Authority declined to record the evidence of the constable whom the petitioner referred to, he contravened any provision of the statute. The next thing to remember is that the authorities referred to in this sub-section have not been given power to summon witnesses or to enforce their attendance. The omission in the statute in this respect suggests that it was not the intention of the Legislature that the authorities in question should examine any witnesses. It may also be mentioned that the petitioner did not offer to produce the constable before the Secretary, Regional Transport Authority, for his examination.

Another circumstance may be mentioned here. All that the Proviso to sub-section (1) of section 60 requires is that, before a permit is cancelled, the holder of the permit should be given an opportunity to furnish his explanation. The suspension of a permit is a less serious penalty than its cancellation. Even as regards cancellation, all that the statute requires is that the operator should be given an opportunity to furnish his explanation. It seems to stand to reason that in respect of the lesser penalty the statute could not have required that a more elaborate procedure should be followed.

When we examine the scheme of the Act, it will be found that contraventions of its provisions and of the rules made thereunder are placed in two categories. In one category is placed those contraventions, for which the offender may be prosecuted and punished in the ordinary criminal Courts. Such matters are provided for in Chapter 9 of the Act. In respect of other contraventions what I may call

departmental action is provided for. This is a very summary method, and all that the authorities concerned are required to do is to give the person proceeded against an opportunity to furnish his explanation. It follows that all that is required is that the person proceeded against should be notified what the allegations against him are and that he should be given an opportunity to explain them.

The further comment I would make is that the right of the petitioner to ply a stage carriage vehicle is derived under the Act. The extent of that right and the circumstances under which that right is liable to be curtailed, abridged or withdrawn are all provided for in the Act and the rules framed thereunder. And so long as these have been complied with, the petitioner cannot properly complain. But this does not mean that the proper authorities are precluded from examining the witnesses and in a proper case they would be exercising a wise discretion if they do examine witnesses produced by a party. All that I would say at this stage is that, under the statute, a person placed in the position of the petitioner has no right to insist that his witnesses should be examined when he is being proceeded against for a transgression of any of the matters enumerated in sub-section (1) of section 60.

Mr. Narayanaswami referred to the decision given under section 18 of the Arms Act in W.P. Nos. 449 and 450 of 1953 and contended that he should have been given an opportunity to examine his witnesses. In respect of that decision, I would make two observations. The first is that in W.P. Nos. 449 and 450 of 1953, the person concerned was given no opportunity whatever even to give his explanation. He was not even told what the allegations against him were. On that ground alone, that decision is distinguishable. The nature of the procedure which has to be adopted when the conditions referred to in the various sub-clauses of sub-section (1) of section 60 are contravened is indicated in that sub-section itself. There is no such indication in section 18 of the Arms Act.

Mr. Narayanaswami finally contended that the reasons given by the State Transport Appellate Tribunal for holding that the mangoes were not luggage are unsound. Even granting that the reasons are open to question, the fact remains,—this fact is recorded by the Regional Transport Authority—that no one claimed the mangoes as his luggage. Instead, freight charges had been collected for them at the rate of four annas per basket. These articles, therefore, constituted goods and cannot be treated as luggage. Mr. Narayanaswami argued that even if these mangoes were treated as goods, that would not involve a contravention of the terms of the permit. I had occasion to consider a similar argument earlier in the course of the week and I held then that such transport would constitute a contravention of the terms of the permit.

In the result, this writ petition is dismissed. There will be no order as to costs.

P.R.N. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Nambikkai Mary Ammal .. *Petitioner**

v.

Prakasa Mary and others .. *Respondents.*

Madras Court Fees and Suits Valuation Act (XIV of 1955), sections 37 and 39—Suits for partition and suit for administration of an estate—Difference.

Where the plaintiff was given a property with a direction that she should pay certain others a part value of the same on a particular date and the plaintiff filed a suit to work out her rights and ascertain the money payable to the others, it is not a suit for partition but a suit for carrying out the directions of the settlor. Court-fee would have to be paid under section 39 of the Madras Court Fees Act by all the parties interested.

* C.R.P. No. 270 of 1958. 6th January, 1959. (16th Pausa 1880, Saka).

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the City Civil Court (Fourth Assistant Judge), Madras, dated 21st October, 1957 and made in Check-slip No. 1401-XII- I in O.S. No. 1448 of 1956, on the question of Court-fee payable on the plaint.

N. K. Mohanarangam Pillai and *N. K. Pattabhiraman*, for Petitioner.

The Additional Government Pleader (*K. Veeraswami*) for the State.

The Court made the following

ORDER.—This is a petition filed by Nambikkai Mary Ammal, plaintiff in O.S. No. 1448 of 1956 on the file of the City Civil Court, Madras, for revising and setting aside the order of the learned Fourth Assistant Judge, City Civil Court, agreeing with the Court-fee Examiner's Check-slip and calling for an additional Court-fee of Rs. 45 from the petitioner. The facts were briefly these.

The petitioner was given by her deceased mother under a deed of settlement, dated 4th October, 1949, the life interest in a house worth Rs. 3,000. After the lifetime of the mother the property was directed to be taken absolutely by the petitioner subject to her paying her brother, David, and sister Prakasa Mary, 1/3rd of the market value of the house at the time of the death of the mother. The price of the house at the time of the death of the mother was Rs. 3,000. So the petitioner had to pay her brother David and sister Mary Rs. 1,000 each under the mother's directions. She filed the suit and prayed that the house in question might be valued, for purposes of working out the partition between herself and her brother and sister, at 1/3rd each, and that the share payable to the first defendant, Prakasa Mary, her sister and David (Defendants 2 to 6 are the legal representatives of David) might be ascertained and fixed and for some other reliefs with which we are not concerned. She paid a Court-fee of Rs. 30 as per the provisions of section 37 (2) of the new Court Fees Act of 1955. The Court-fee Examiner objected that this suit was not a suit for partition but one for administration of the deceased mother's estate and that therefore the section applicable was not section 37 (2) but section 39, and so the plaintiff should have paid a Court-fee of Rs. 75 and that defendant 1 and defendants 2 to 6 representing David, the deceased brother, should also pay Rs. 75 each as Court-fee. The lower Court agreed with this view of the Court-Fee Examiner and directed the payment of the additional Court-fee. The petitioner has felt highly aggrieved at this order and has filed this petition.

I have perused the records and heard the learned counsel, Mr. N. K. Pattabhiraman, for the petitioner, and the learned Additional Government Pleader *contra*. Mr. N. K. Pattabhiraman was unable to show how the suit can be construed to be a suit for partition when the prayer was not to partition the suit house into three equal shares and deliver to the plaintiff one share and the first defendant another share, defendants 2 to 6 jointly the third share. The prayer was to carry out the directions of her deceased mother, for administering the estate of her mother consisting of this house. So the lower Court was right in accepting the Court-fee Examiner's Check-slip and directing the additional Court-fee to be paid.

This petition deserves to be and is hereby dismissed, but in the circumstances, without costs. Two months time from this date given to the plaintiff and defendants to pay the deficit Court-fee as prayed for.

R.M. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

Mamundi Kaduvetti .. *Appellant**

v.

Somasundaram Chetti and others .. *Respondents.*

Madras Agriculturists Relief Act (*IV of* 1938), *section* 9-*A—Co-mortgagor redeeming the entire property—Claim to subrogation—Whether the section applies to redemption by other mortgagor—Transfer of Property Act* (*IV of* 1882), *section* 92—*Right of subrogation—Nature of.*

A co-mortgagor redeeming the entire property and being subrogated to the rights of the mortgagor in regard to the excess payment of mortgage money paid by him could not be in the position of a mortgagee within the meaning of section 9-A of the Madras Agriculturists Relief Act and therefore the claim of such mortgagor for subrogation cannot be discharged by virtue of that section.

When one of the two co-mortgagors discharges an encumbrance binding on both, the person so discharging could not recover from his co-mortgagor more than the proportionate share of the amount actually paid by him. That is to say the mortgage in its original form is not enforceable as regards the amount due on it but it is only the proportionate liability of the property other than his own to which he would be entitled to under subrogation. Subrogation does not mean a complete substitution of the subrogee in the place of the mortgagee as if the claim is to be enforced on the original mortgage but is restricted both in regard to the debt as well as the security. It is a re-creation of the debt paid off by virtue of the law and for a limited purpose varying with the interest of the person who redeems the amount paid off.

Section 9-A cannot obviously apply to a case of subrogation because the right of subrogation is not by virtue of the execution of the mortgage. It is a right under the law on payment of the mortgage amount by one of the persons mentioned in section 91 of the Transfer of Property Act. Nor can it be said that the mortgagee is in possession of the property mortgaged by virtue of the original mortgage. It is the payment and redemption which entitles the co-mortgagor to be in possession of the property and not the execution of the mortgage by the original mortgagee.

Case-law discussed.

Appeal against the Decree of the Court of the Subordinate Judge of Tanjore, in Appeal Suit No. 138 of 1955, preferred against the Decree of the Court of the District Munsif of Pattukottai, in Original Suit No. 370 of 1953.

M. S. Venkatarama Ayyar, for Appellant.

K. S. Desikan and *K. Raman,* for Respondents.

The Court delivered the following

JUDGMENT.—This Second Appeal arises out of the decree of the learned Subordinate Judge of Tanjore in A.S. No. 138 of 1955, modifying that of the District Munsif of Pattukottai in O.S. No. 370 of 1953.

The plaintiff is the appellant in this Second Appeal. He filed the suit for redemption of a mortgage, Exhibit A-1, dated 22nd June, 1898, under the following circumstances. The suit properties and certain other properties were originally owned by one Muthu and his son Odayappa. They executed a possessory mortgage over certain items of properties in favour of one Sokkan Chettiar prior to 1898. On 22nd June, 1898, they executed a second usufructuary mortgage under Exhibit A-1 over those and certain other properties in favour of one Ramaswami. The mortgagee was directed to redeem from out of the portion of the mortgage money left in his hands the earlier mortgage in favour of Sokkan. The second mortgagee however failed to so redeem. The right of the mortgagee under Exhibit A-1 was transferred to one Alagappan. On the side of the mortgagor there were a few transactions by way of sales of equity of redemption as a result of which the properties vested in regard to some items in the appellant's father, some others in Sokkan, and the remaining properties in one Karuppan and one Arunachalam. The result is that the three sets of persons above-named, namely, the plaintiff's father Sokkan and Karuppan and Arunachalam came to own the equity of redemption

*Second Appeal No. 866 of 1956. 27th November, 1958.
(6th Agrahayana, 1880—Saka).

and were in the position of co-mortgagors. Thereafter suits for redemption were filed. O.S. Nos. 52 and 158 of 1926 were filed, by Alagappan in the Court of the District Munsif of Pattukottai to redeem Sokkan's mortgage. O.S. No. 281 of 1952 was filed by Sokkan claiming as the owner of the equity of redemption under the transfer above-mentioned to redeem Alagappan's mortgage. In those litigations a decree was ultimately passed decreeing redemption of Alagappan's mortgage by Sokkan as well as Karuppan and Arunachala. In pursuance of the decree for redemption Sokkan paid a sum of Rs. 1,092 and Karuppan and Arunachala paid a sum of Rs. 1,226 redeemed Exhibit A-1 and entered into possession of the respective properties. Thereupon the appellant claiming under the purchase by his father filed the suit for redemption out of which the Second Appeal arises against the representatives of Sokkan.

His case was that he was in the position of a co-mortgagor and was entitled to redeem the mortgage to which Sokkan and the other persons became entitled by virtue of being subrogated to the rights of Alagappan's mortgage, which they redeemed. The appellant's further case was that Karuppan and Arunachala had executed a release of their rights in his favour. As regards the mortgage money payable for redemption, the appellant claimed that no amount was due as the debt was discharged under the provisions of section 9-A of Madras Agriculturists Relief Act (IV of 1938), the mortgagee under Exhibit A-1 having been in possession of the properties for more than 30 years.

This claim was contested by the respondents who claimed under Sokkan. They pleaded that certain items claimed in the plaint were not the subject-matter of mortgage under Exhibit A-1 that certain other items were lost to the mortgagee by reason of adverse possession, etc., and that as regards the remaining items Sokkan and his representatives were entitled to retain what they purchased from the mortgagor. They also contested the claim of the appellant as to the applicability of the provisions of section 9-A of Madras Act IV of 1938.

The District Munsif held that four of the items mentioned in the plaint were not included in the othi, and that therefore the appellant was not entitled to redeem them. He further held that the appellant has lost title to about 20 items on account of adverse possession of the same by third parties and that the plaintiff was entitled to redeem only the remaining items. The District Munsif accepted the case of the appellant that he was entitled to the benefits of Madras Act IV of 1938 and that by reason of the possession and enjoyment of the mortgaged items by the mortgagee, for over 30 years, he held that the appellant was not bound to pay any amount towards the redemption. In the result a decree for possession was passed.

An appeal was preferred against the decree of the District Munsif by the contesting defendants to the Sub-Court. The learned Subordinate Judge affirmed the finding of the trial Court in regard to the title of the appellant to the various items of the properties. He, however, held that the appellant was liable to pay the share of the mortgage money attributable to the properties sought to be redeemed together with the aliquot share of the moneys expended for the redemption and that that such liability was not liable to be discharged under the provisions of section 9-A of Madras Act IV of 1938. The learned Subordinate Judge, therefore, directed the quantum of debt to be ascertained in the final decree. The plaintiff has filed the Second Appeal against the decree of the lower appellate Court.

The only question argued on his behalf is as to the applicability of section 9-A of Madras Act IV of 1938, to the present case. It may be noticed that the mortgage which is sought to be redeemed is Exhibit A-1, dated 22nd June, 1898. Sokkan and his representatives who are in possession of the properties by virtue of the decree for redemption in O.S. No. 281 of 1926 are in the position of co-mortgagors who have redeemed that mortgage. The contention on behalf of the appellant is that a co-mortgagor on redemption becomes entitled to subrogation of the original mortgage and that the appellant who seeks to redeem in the present suit is redeeming that mortgage, and that therefore the provisions of section 9-A would apply.

Mr. M. S. Venkatarama Iyer, the learned counsel for the appellant, contends that the position of Sokkan on redemption of the mortgage, Exhibit A-1, is that of a transferee of that mortgage, and therefore the appellant would be entitled to relief under section 9-A of the Madras Agriculturists Relief Act of 1938. In support of the contention he relied upon the decision in *Rahimansa Rowther* v. *Madras Islamia Education Institution*[1], where it was held that the case of a co-mortgagor redeeming the mortgage is an instance of subrogation, and that the redeeming mortgagor has not merely a charge to the mortgage as to his share but he stands in the shoes of the mortgagee in regard to the shares of other mortgagees ; and such a right as a mortgagee relates back to the date of the mortgage, which has been redeemed. At page 407 Subba Rao, J., observed referring to sections 91, 92 and 95 of the Transfer of Property Act thus :—

> " Under the aforesaid sections it is obvious that the co-mortgagor will be subrogated to the right of the mortgagee if he redeems the mortgagee. To put in other words he will be substituted for the mortgagee whom he paid off."

The learned Judge again observed at page 408 :—

> "Indeed section 92 of the Transfer of Property Act clearly states that the co-mortgagor redeeming the mortgage has the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee."

Reliance was placed upon the observation contained in *Arumuga* v. *Chockalingam*[2], that the term mortgagee in Article 148 of the Limitation Act includes an assignee of a mortgagee and even a co-mortgagor by whom the mortgaged property has been redeemed.

The learned advocate for the appellant, therefore, contends that Sokkan being subrogated to the rights of the mortgagee, under Exhibit A-1 would be in the same position as the original mortgagee, namely, Ramaswami, and he would be liable to be redeemed on the same terms and conditions, and that therefore the provisions of section 9-A of the Agriculturists Relief Act, 1938, would apply to the instant case.

The question then is whether a co-mortgagor redeeming the mortgage is to be considered in every respect to be in the position of or substituted for the original mortgagee. In Mulla's Transfer of Property Act, 4th edition, at page 534, it is stated :

> " A co-mortgagor redeeming a mortgagee is a simple case of subrogation for a co-debtor is a principal debtor in respect of his own share and a surety in respect of his co-debtor's share and when a surety has paid the debt, he is entitled to avail himself of all the creditor's securities ".

The effect of a co-mortgagor redeeming a mortgage however is not the same as a stranger redeeming a mortgagee under section 92 (3). In the latter case the stranger would be completely subrogated to the rights of the mortgagee he redeems. But in the case of a co-mortgagor the result on redemption of the mortgage would be that the mortgage as to his share would be extinguished and would subsist only in regard to the shares of other co-mortgagors and in regard to which alone he would stand in the position of a mortgagee. In *Asansab* v. *Vamana Row*[3], it was held that where the person in the position of a co-mortgagor pays the entire mortgage debt he puts himself in the place of the mortgagee redeemed and acquires a right to treat the other mortgagors as his mortgagors and to that portion of the estate in which he would have no interest but for the payment as a security for any surplus payment he might have made. At page 225 the learned Judges observed :

> " It has long been the recognised doctrine of Courts of Equity in England that the owner of the equity of redemption of a part of an estate under mortgage is entitled to redeem the whole of the mortgaged estate if the mortgagee as in this case insists upon his right to have it so redeemed. Where the former elects to pay the entire mortgage debt he thereby puts himself in the place of the mortgagee redeemed and acquires a right to treat the original mortgagor as his mortgagor and to hold that portion of the estate in which he would have no interest but for the payment as a security for any surplus he might have made."

1. (1952) 2 M.L.J. 404.
2. (1892) I.L.R. 15 Mad. 331.
3. (1879) I.L.R. 2 Mad. 223.

This decision was rendered before the Transfer of Property Act. In a case from the Punjab where the Transfer of Property Act does not apply, *Ganeshlal* v. *Jothi Prasad*[1], the Supreme Court held that where one of the co-mortgagors redeems a mortgage over the property which belongs jointly to himself and the rest, equity as embodied in the doctrine of subrogation confers on him a right to reimburse himself for the amount spent in excess by him in the matter of redemption, and that he can call upon the co-mortgagors to contribute towards the excess which is paid over his own share and a co-mortgagor so paying stands in the mortgagee's shoes only to the extent of getting reimbursed from the co-mortgagors for their shares in the amount actually paid by him and not for the whole amount due on the mortgage. This is also the law under the Transfer of Property Act.

It is, therefore, clear that when one of the two co-mortgagors discharges an encumbrance binding on both, the person so discharging could not recover from his co-mortgagor more than the proportionate share of the amount actually paid by him. That is to say that the mortgage in its original form is not enforceable as regards the amount due on it but it is only the proportionate liability of the property other than his own to which he would be entitled to under subrogation. That the subrogation does not mean a complete substitution of the subrogee in the place of the mortgagee as if the claim is to be enforced on the original mortgage is made clear in the decision in *Digambardas* v. *Harendra Narain*[2]. In that case a question arose as to whether the co-mortgagor who was subrogated to the original mortgagee's rights was entitled to the interest after the date of payment. It was held that the Court when invited to enforce the right of subrogation can exercise its judicial discretion in the award of interest and in the determination of the period for which it was to be allowed. In such a case there would be no complete subrogation as the subrogee was not entitled to the interest at the rate mentioned in the document. The learned Judges observed at page 168 thus :—

> "In fact if we remember for a moment the principle upon which the doctrine of subrogation rests it becomes obvious that the Court has discretion so far as any right as to interest and the period during which it is to run are concerned. It is only by a fiction of law that the mortgagor who redeems the security is substituted in the place of the original creditor, and although it is sometimes said that the substitute is put in all respects in the place of the party to whose rights he is subrogated, even a superficial consideration will show that the statement is too broad and requires qualification. In so far as any question of priority is concerned, he no doubt enjoys the same advantages as the original mortgagee and is entitled to priority over subsequent mortgagees from his co-mortgagor. In so far as the amount of money which he is entitled to recover from his co-mortgagors is concerned, he can claim contribution only with reference to the amount actually and properly paid to effect redemption, to which sum he can add his legitimate expenses. In so far as interest on these sums is concerned, he cannot claim it for any period antecedent to the redemption. The substitution, therefore, of the new creditor in place of the original one, does not place the former precisely in the position of the latter for all purposes."

It has been held that a subrogee can acquire no greater rights than the party for whom he is substituted. It has also been held that if the subrogee wants to enforce his rights over the mortgage redeemed he would be governed by the rules of limitation which would be applicable to the mortgage redeemed. But his rights differ from that of an assignee of a debt by reason of the basis of the law as to subrogation being the outcome of the principles of equity. He would not for instance be entitled to enforce the entire claim on the mortgage if he had paid only a smaller amount and the subrogation in that case would be limited to the amount paid. In the case of a mortgage where there is more than one person interested in the equity of redemption and one of such persons pays the entire mortgage, what he woud get on subrogation would not be an assignment of the entire mortgage right, as it would mean that he would be the mortgagee of his own property, but a right to proceed on the basis of the mortgage against the other properties to recover that portion of the debt attributable to those properties on the principles of contribution. This, however, is not a mere right of contribution recognised in sections 82 and 100 of the Transfer of Property Act. This is a right by virtue of an assignment as it were of the

1. (1952) S.C.J. 649 ; 1953 S.C.R. 243 ; A.I.R. 1953 S.C. 1.
2. (1910) 5 I. C. 165.

mortgage to the subrogee to the extent necessary to do justice to him. In Sheldon on Subrogation (second edition) page 264, it is stated:

"If the security is a mortgage, and the whole debt is paid to save the estate of the party paying it, by one of two tenants-in-common who have, since the giving of the mortgage, acquired the equity of redemption, the assignment of the mortgage to this co-tenant will not extinguish its claim in favour of the other, who has paid nothing. That share of the mortgage debt which belonged to such an assignee to pay is extinguished, his title to his portion of the mortgaged property is perfected ; and he is subrogated to the rights of the mortgagee as to the other share, and may call upon his co-tenant to pay him the proportion of that share, or before closed of the right to redeem. . . . . . . As between the purchasers in common of an estate bound by a joint lien, each share is obliged to contribute only its proportion of the common burden, and beyond this this amount is to be regarded as the surety of the others; and if the owner of one share is called upon to pay more than its due proportion of the debt, such owner or his creditors will be entitled to stand in the place of the satisfied creditor to the extent of the excess which ought to have been paid out of the other shares."

But subrogation to the rights of a mortgagee differs from the case of an assignment of the mortgage debt as such, because (1) the subrogation is by the process of law and only to the extent necessary, and (2) in the case of an assignment there is an assumption of the continued existence of the debt while subrogation follows the payment of the debt. I have already pointed out that, in the case of a co-mortgagor redeeming the subrogation is restricted both in regard to the debt as well as the security. Thus, although a subrogation amounts to an assignment as it were of the mortgage paid off, it is re-creation of the debt paid off by virtue of the law and for a limited purpose varying with the interest of the person who redeems, the amount paid off, etc.

The question then for consideration is whether section 9-A of Act IV of 1938 would apply to such a claim, *i.e.*, to a debt created as it were by the fiction of law. Section 9-A (1) is as follows :—

"This section applies to all mortgages executed at any time before the 30th September, 1947, and by virtue of which the mortgagee is in possession of the property mortgaged to him or any portion thereof."

It is clear that in the present case Sokkan's representatives are not in possession by virtue of a mortgage; nor can it be said that the claim under subrogation is a claim by virtue of the execution of a mortgage. This section cannot obviously apply to a case of subrogation, because the right of subrogation is not by virtue of the execution of the mortgage. It is a right under the law on payment of the mortgage amount by one of the persons mentioned in section 91 of the Transfer of Property Act. Nor can it be said that the mortgagee is in possession of the property mortgaged by virtue of the original mortgage. It is the payment and redemption which entitled the co-mortgagor to be in possession of the property and not the execution of the mortgage by the original mortgagor. I am, therefore, of the opinion that a co-mortgagor redeeming the entire property and being subrogated to the rights of the mortgagor in regard to the excess payment of mortgage money paid by him could not be in the position of a mortgagee, within the meaning of section 9-A of Madras Act IV of 1938, and therefore the claim of such a co-mortgagor for subrogation cannot be discharged by virtue of that section.

The conclusion arrived at by the learned Subordinate Judge is, therefore, correct. This appeal fails and is dismissed with costs.

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMACHANDRA IYER.

The State of Madras represented by the District Collector of Tiruchirapalli .. *Appellant**

v.

S. Krishnasami Ayyangar and others .. *Respondents.*

Riparian Rights—Right of owner of land adjoining a river to take water from the river for irrigating his land—Scope and extent of—Natural and artificial streams—If makes any difference—Madras Irrigation Cess Act (VII of 1865), section 1.

Apart from questions of specific grants and ownership of beds of rivers there are certain rights recognised under the law in the owners of lands on the banks of rivers to the waters of the river. This right, known as the riparian right, is a natural right inherent in the owner of the property due to its proximity to the river and has nothing to do with the ownership or vesting of the bed of the river. The right to enjoy the water abutting on a man's property is a natural right and does not depend on any grant. Being thus a natural right it can apply only to cases of a natural stream. In cases of artificial streams, however, such a right is not inherent in the owner of the land but is regulated by contract, grant or prescription. But even in such cases what was originally an artificial stream might, in certain circumstances of usage, clothe the owner of the land on its bank with all the rights of a riparian owner as if it had been a natural stream.

The Uyyankondan Channel in Tiruchirappalli District, though an artificial one, is of such great antiquity and when it is established that the owners of land adjoining that river have been using its waters from time immemorial they will have all the rights of riparian owners to its waters.

Appeal against the decree of the District Court of Tiruchirapalli in Appeal Suit No. 220 of 1955, preferred against the Decree of the Court of the District Munsiff of Tiruchirapalli in Original Suit No. 411 of 1951.

The Government Pleader (*B. V. Viswanatha Ayyar*), for Appellant.

V. Tyagarajan and *M. A. Rajagopalan,* for Respondents.

The Court delivered the following

JUDGMENT.—This Second Appeal arises from the decree of the Additional District Judge of Tiruchirappalli in A.S. No. 220 of 1955 reversing that of the District Munsiff of Tiruchirappalli in O.S. No. 411 of 1951. The State of Madras represented by the Collector of Tiruchirappalli, the defendant in the suit, is the appellant.

The suit was filed for a declaration that the plaintiffs as the riparian owners of the Uyyankondan river in Tiruchirappalli district were entitled to bale out water from the river free of tax for the irrigation of their inam lands in Sendanipuram village, and for refund of Rs. 100 collected from them by way of tax. Inam Sendanipuram which comprises of an extent of 144.29 acres is a hamlet of the village of Varaganeri in Tiruchirapalli District. It was originally granted as a personal inam to one Karibulla Sahib in 1875 by the Carnatic rulers. The grant was recognised and confirmed by the British Government. Ex. D-3 is an extract of the fair inam register in regard to this village. The northern boundary of Sendanipuram is Uyyankondan river .This river is connected with the river Cauveri and it is said to have been in existence from time immemorial. Respondents who were successors in interest to the grantee of the inam have been irrigating the nanja

*Second Appeal No. 851 of 1956.

4th December, 1958.
(13th Agrahayana, 1880—Saka).

lands with the river water. As the lands are in a level higher than the level of the water of the river the respondents have constructed six piccotas in the river, one of them being in the middle of the river for the purpose of raising the water. The structures are masonry ones. Admittedly the Government did not levy any cess for the taking of water by the respondents all these years till 1950. It is stated that owing to enmity between the respondents and the karnams, a cess was levied for the first time in F. 1359, which cess the plaintiffs-respondents paid under protest. The respondents claimed that they were entitled to take water from the river for agricultural purposes by reason of the riparian rights that they had in respect of the waters in the river, and that they were not liable to pay the tax levied by the Government. They, therefore filed the suit as stated above.

The suit was contested by the appellant. The appellant stated that Uyyankondan river was a Government channel, in which the respondents could have no rights, and that in any event the respondents had no right to convert what were once dry lands into nanja lands by the use of Government water. They, therefore, stated that the respondents were liable to the cess levied.

The District Munsiff held that Uyyankondan river was not a natural stream but a Government channel, that there was no evidence of any express or implied engagement for the supply of water by the Government, and that therefore the respondents were liable for the cess levied on them. On those findings, he dismissed the suit.

The respondents thereupon filed an appeal to the District Court of Triuchirappalli. The learned District Judge held that as the river was the northern boundary of the inam village and adjoining the nanja lands of the village and as the lands have been cultivated openly for more than 80 years with the water in the channel which belonged to the Government the respondents were entitled to take water from the channel as usual without liability to pay any irrigation cess. In that view, he allowed the appeal and decreed the suit as prayed for. Hence this appeal.

The liability to water cess is governed by section 1 of the Madras Irrigation Cess Act, VII of 1865. That section authorises the levy of cess for water supplied or used for the purposes of irrigation from any river, stream, etc., belonging to or constructed by the Government. There is a proviso to the section in regard to inams and zamindaries. The learned District Judge considered the several cases on the subject and came to the conclusion that in the circumstances of the case, it should be held that the respondents were entitled to use the water in Uyyankondan river free from the payment of tax by virtue of an engagement or by virtue of their riparian rights. Under the grant the river is stated to be the northern boundary of the property granted in inam. It is, therefore, clear that the river as such was not intended to be part of the grant. In the view I am taking of the case in regard to the riparian right claimed by the respondents it is unnecessary to consider for the purpose of this case whether notwithstanding the fact that the river as such was not granted to the inamdar there could be a presumption that a riparian owner owns half the bed of the river. This point has been discussed in Coulson and Forbes on the Law of Waters and Land Drainage, VI Edition, at pages 114 to 116.

The Grant however gives the grantee all the rights over the property granted. If the property granted has certain natural rights it would also pass to the grantee. Apart from the ownership of the bed of the river,

there are certain rights recognised under the law in the owners of land on the banks of the rivers. That right is stated to be by reason of the right of access or proximity which the particular land has to the water in running river. Such a right is called a riparian right which is a right relative to the bank, and not to the bed of the stream. It is a natural right, which inheres in the owner of the abutting property. In *Chasemore* v. *Richards*,[1] Lord Wensleydale stated:

"The subject of right to streams of water flowing on the surface has been of late years fully discussed, and by a series of carefully considered judgments placed upon a clear and satisfactory footing. It has been now settled that the right to the enjoyment of a natural stream of water on the surface, *ex jure naturae*, belongs to the proprietor of the adjoining lands, as a natural incident to the right to the soil itself, and that he is entitled to the benefit of it, as he is to all the other natural advantages belonging to the land of which he is the owner. He has the right to have it come to him in its natural state, in flow, quantity and quality, and to go from him without obstruction; upon the same principle that he is entitled to the support of his neighbour's soil for his own in its natural state. His right in no way depends upon prescription, or the presumed grant of his neighbour".

The right to enjoy the water abutting on a man's property being thus a natural incident to his right of property, it does not depend for its existence on any grant. Therefore even if the original inam grant did not comprise a right to take the water from the Uyyakondan river the grantee would nevertheless have a riparian right in respect of the water by reason of the fact that the property granted to him is abutting on the river.

Riparian right being a natural right, can only apply to a natural stream. In the *Secretary of State for India* v. *Subbarayadu*,[2] it was held that the property in land bounded by a river has inherent in it the riparian right to take water from the river for irrigating the land. In that case, a land was bounded by a tidal channel and the owner of the land took water from it for irrigating his land. The Government levied a cess upon him, and the question arose whether the levy was legal. The Privy Council held that the right of the riparian owner to use the water in a stream does not depend upon the ownership of the soil of the stream and that he has two rights (*i*) to take the water for domestic use and (*ii*) for use connected with the land; the irrigation of the land being one such right. In regard to the later right the use must be reasonably connected with the tenement, and the riparian owner is bound to restore water which he takes for those purposes substantially undiminished in volume and unaltered in character. It was, therefore, held that Government was not entitled to levy the tax as the user was not excessive in that case. This rule does not, however, apply to artificial streams. An artificial stream is a stream which flows at its source by the operation of man, or if it flows at its source by the operation of nature it flows in a channel made by men. Vide *Narasimhalu* v. *Bhadrayya*.[3] Where a stream is artificial, natural rights cannot possibly exist, and therefore no question of riparian right can ordinarily arise. In Coulson and Forbes on the "Law of Waters, 6th edition, at page 130, it is stated thus:

"Where a stream is artificial, that is does not arise *ex jure naturae* from the soil but flows in a channel cut by artificial means through the lands of adjoining proprietors the rights of such proprietors are not *prima facie* the same as those of proprietors of natural streams. The mutual rights of the parties in such cases are not natural but acquired rights and are dependent for their existence entirely on the words of the grants by which they have been acquired or in the nature of the user which can be proved if the claim is by prescription. A water course, however, of course though an artificial one may have been made under such circumstances as to confer all such rights as a riparian owner would have had in the case of a natural stream."

1. (1859) 7 H and L 349 at 382 : 11 E.R. 140, 153.
2. (1931) 62 M.L.J. 213 : L.R. 59 I.A. 56 : I.L.R. 55 Mad. 268 (P.C.).
3. A.I.R. 1933 Mad. 10 at 12.

In *Rameshwar Prasad Narain Singh* v. *Kunj Bihari Pathuk*,[1] the Privy Council held that the right to water flowing in a man's land through an artificial course constructed on a neighbour's land must rest on some grant or arrangement proved or presumed from or with the owner of the land from which the water is artificially brought or some other legal origin. In the case of a river like Uyyakondan which does not take its origin from the land of any private individual but from a natural stream there can possibly be no question of any grant by any proprietor of the land from which the stream originates. But it is possible that when the stream was constructed originally it might have been intended to give the persons through whose lands it flows all the rights which they would have had as riparian owners had the stream been a natural one.

In *Maung Bya* v. *Maung Kyi Nyo*[2], the Privy Council held that though in the case of a natural water course various riparian owners are entitled as an incident of their ownership to certain rights and in the case of an artificial water-course the right is regulated by prescription or grant or any contract with the owner of the land from which the water was artificially brought. At page 506 they observed:

"There is, however, a well established principle of law directly bearing upon this case and vitally affecting it, namely, that the water-course originally artificial may have been made under such circumstances and may have been used in such a way that the owner of the land situated on its bank will have all the rights that a riparian owner has if it had been a natural stream."

In Volume I of the *Trichinopoly District Gazetteer*, at page 36, it is stated with reference to Uyyakondan river thus:

"The Mamundiar which rises in the scattered hills in the Kulitalai taluk empties itself just above the town of Tiruchirappalli into the Uyyakondan channel, one of the irrigation channels which takes off from the river Cauveri. It is also stated that it has several names being known in the different parts of its course as Ariyar, Koraiyar and the Pannayar".

The channel, though artificial, is one of great antiquity. It should have been constructed by the ancient Rajahs for the purpose of irrigation. It is well-known that similar channels or rivers were constructed in the delta district of Tanjore by the Chola Kings. The evident object in the construction of the channel should have been for irrigation. The object could have been achieved only if it was intended that these artificial channels should supply water to the owners of the abutting lands in the same way in which water was taken from the natural streams. These circumstances coupled with the other circumstances of the Government admittedly not having levied cess for the last 80 years would support the finding of the learned Judge that the user by the respondents had a lawful origin. It is therefore, clear that although Uyyakondan river as such is only an artificial channel it should be deemed to have been impressed with the qualities of a natural channel as indeed similar rivers in the neighbouring Tanjore District have, so as to invest the owners of lands abutting on the river with riparian rights. On this it follows that the Government could not levy the cess in the case. It is not claimed on the part of the appellant that the user made by the respondents of the water was excessive.

Under the circumstances, the decree and judgment of the lower Appellate Court are correct. This second appeal fails and is dismissed with costs. Leave refused.

R.M. *Appeal dismissed.*

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1. (1878) I.L.R 4 Cal. 633.
2. (1925) 49 M.L.J. 282 : L.R. 52 I.A. 385: I.L.R. 3 Rang. 494 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Appellate Jurisdiction].

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE GANAPATIA PILLAI.

V. N. S. Chockalingam Chettiar and others .. *Appellants**

v.

Income-tax Officer, Pudukottai .. *Respondent.*

Income-tax Act (XI of 1922), *section* 18-A (3)—*Failure to pay advance tax under—Entails charging of interest under sub-sections* (6) *and* (8)—*Section* 35—*Omission to charge interest—Rectification.*

A failure to pay the advance tax under section 18-A (3) of the Income-tax Act would entail payment of interest as laid down under the provisions of sub-sections (6) and (8) of section 18-A.

Section 35 requires that the mistake is apparent in the record of the appeal, revision, assessment or refund. If the order of assessment shows that interest has not been added to the tax determined on the basis of the regular assessment and such omission was a mistake, section 35 directly applies and the mistake can be rectified under that section.

Appeals under clause 15 of the Letters Patent against the order of Balakrishna Ayyar, J., dated 18th July, 1958 and 16th April, 1958 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P. Nos. 990, 931, 932 and 1498 of 1956 presented under Article 226 of the Constitution of India to issue writs of *certiorari* calling for the records relating to the orders of the Respondent in G.I. No. 93-S/1951-52, dated 22nd March, 1956; G.I. No. 54-N/1951-52, dated 27th March, 1956; G.I. No. 151/K/1951-52, dated 28th March, 1956 and G.I. No. 80-C/1951-52, dated 28th March, 1956, respectively levying penal interest of Rs. 10,174-10-0, Rs. 8,196-12-0, Rs. 9,756-13-0, and Rs. 6,542-13-0 respectively under section 35 read with section 18-A (8) of the Indian Income-tax Act and to quash the orders therein.

K. Srinivasan, for the Appellants.

The Judgment of the Court was delivered by

Rajamannar, C.J.—Two points were urged by Mr. Srinivasan, learned counsel for the appellant in these appeals, against the common judgment of Balakrishna Ayyar, J., disposing of three writ petitions. The first point is that when there is a failure on the part of the assessee to submit an estimate under section 18-A (3) the only consequence is that mentioned in sub-section (9) (*b*) of that section, namely, that he would be liable to penalty which may be levied in accordance with the proviso to sub-section (9) (*b*) and that sub-section (8) which provides for the payment of interest would have no application. Learned counsel was unable to cite any direct authority in support of this contention. He relied on an observation in the Judgment of the learned Chief Justice of Bombay in *Commissioner of Income-tax* v. *Jagadishprasad Ramnath*[1], which runs thus :

"The liability to pay advance tax in this case only arises if he submits an estimate, but if he fails or refuses to submit an estimate, no obligation to pay advance tax can arise and his only liability would be, if it was found on his regular assessment that he was liable to pay advance tax, to pay a penalty under section 18-A."

It is true that the learned Chief Justice used the word 'penalty' but does not refer to clause (*b*) of sub-section (9) of section 18-A. We have no doubt whatever that what the learned Chief Justice was referring to was the interest levied under sub-section (8) in that case. Actually the point which fell for decision in that case was whether an appeal lay to the Appellate Assistant Commissioner from an order passed by the Income-tax Officer levying interest under section 18-A(8) of the Income-tax Act. We may point out that though this was all that was levied in that case the statement of the case referred to the levy of interest as levy of a penalty under

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* Writ Appeal Nos. 17 and 25 to 27 of 1959. 12th March, 1959.
(21st Phalguna of Saka 1880).

1. (1955) 27 I.T.R. 192 at 200 ; A.I.R. 1955 Bom. 255.

section 18-A (8). It is obviously incorrect because section 18-A (8) does not contemplate levy of any penalty. Likewise in the second question of law, the interest levied under section 18-A (8) of the Income-tax Act is referred to as penal interest. This again is not warranted by the provisions of the Act and we are in entire agreement with the observations of Balakrishna Ayyar, J., in his judgment under appeal that the interest levied under sub-section (8) of section 18-A is not penal interest. We, therefore, see nothing either in the decision or the observation above referred to by the Chief Justice in *Commissioner of Income-tax* v. *Jagadishprasad Ramnath*[1], to support the appellant. Apart from authority, we are unable, on the plain language of the provision, to accept the argument of Mr. Srinivasan that if a new assessee fails to submit a return, the *only* consequence is that penalty can be imposed upon him. The reference to section 28 in sub-section (9) (*b*) of section 18-A shows that the penalty is for failure to furnish estimate. The interest leviable under sub-section (8) of section 18-A, on the other hand, is interest on the basis of the regular assessment. In this case, admittedly there was no payment of advance tax under section 18-A which was payable by the assessee. Therefore the provisions of sub-section (8) of section 18-A apply and the Income-tax Officer was justified in adding to the tax the interest calculated in the manner laid down in sub-section (6) of section 18-A.

The other point pressed upon us was that section 35 would have no application in this case because interest levied under sub-section (8) of section 18-A is not part of the assessment and the power of rectification conferred under section 35 is only rectification for mistake in the assessment as such. This contention is based on a fallacy. Under section 35 what is rectified is a mistake—any mistake which has been brought to the notice of the Income-tax Officer. But all that the provision requires is that the mistake is apparent in the record of the appeal, revision, assessment or refund. The mistake need not be in the assessment as such. If the order of assessment shows that the penal interest has not been added to the tax determined on the basis of the regular assessment and such omission was a mistake, in our opinion, section 35 directly applies and the mistake can be rectified under that section.

In the result, these appeals are dismissed.

V.S. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN.

M. M. Hajee Mohamed Yusuf Sahib .. *Petitioner**

v.

State of Madras, by Secretary, Industries, Labour and Co-operation and another .. *Respondents.*

Minimum Wages Act (*XI of* 1948), *section* 3—*Notification revising the minimum wage fixed by a prior notification on the basis of a quantum of unit—Notification, if invalid—Whether if offends Article* 14 *of the Constitution of India* (1950).

The quantum of unit on which depended the minimum wage that was payable was defined in 1950 under the Act and the unit had to be fixed with reference to custom and usage in the largest number of tanneries in the locality. The notification made in 1956 and now under consideration only enhanced the minimum rate. Where there was no arrangement that there had been any difficulty in implementing the directions in the notification of 1950 or in ascertaining what the quantum of the unit was, the notification of 1956 cannot be held invalid on the ground that the unit of work had not been laid down with precision.

Though the notification itself did not provide for any machinery to resolve disputes to determine the quantum of the unit, it could be referred to as an industrial dispute for adjudication under the Industrial Disputes Act

The notification does not offend the provisions of Article 14 of the Constitution.

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*W.P. Nos. 1324 and 1325 of 1956. 14th October, 1958.

1. (1955) 27 I.T.R. 192 : A.I.R. 1955 Bom. 255.

Petition under Articles 226 and 14 of the Constitution of India, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* to quash the orders of Government, the Respondent, No. 3910, dated 30th August, 1951 and 4192, dated 25th September, 1956, published in *Fort St. George Gazette*, Part I, dated 19th September, 1951 and 29th September, 1956 respectively as they are discriminatory and repugnant to Article 14 of the Constitution so far as they fix the minimum wage of piece-rate workers with regard to the difference in quantum of unit between the tanneries at Dindigul and tanneries at other centres and for such appropriate writ or writs as the Court may think fit.

O. T. G. Nambiyar for *Messrs. King and Partridge*, Attorneys for the Petitioner.

The Additional Government Pleader (*K. Veeraswami*), for the 1st Respondent.

A. Ramachandran for *Messrs. Row and Reddy*, for the second Respondent.

The Court made the following

ORDER.—The petitioner carries on business as a tanner at Dindigul. Tanneries were shown as item 12 in Part I of the Schedule to the Minimum Wages Act (XI of 1948). Under section 3 of the Act the State Government was empowered to fix the minimum wages for the workers in tanneries. On 30th August, 1951, the Government of Madras issued a notification, G.O. 3910, fixing the minimum wages payable to several classes of workers in tanneries. I am concerned now only with the minimum wages prescribed for one class of workers, the piece-workers. What was prescribed as the minimum for that class of workers was ten annas per unit of work done. The note ran:

"Quantum of unit will depend on the custom and usage in the largest number of tanneries in the locality for the same or similar kind of work. No piece-rate workers should be paid less than a guaranteed time rate of 10 annas per day with a minimum cost of living allowance of 11 annas per day".

Thus two concepts were involved : a minimum of ten annas per unit, and the daily payment itself, whatever be the quantum of work turned out, was subject to a minimum of ten annas plus D.A.

In 1956, these rates were revised, and by G.O. 4192, dated 25th September, 1956, the Government raised the minimum wage payable to piece-workers from 10 annas to 12 annas. The same note as was appended to the rate fixed in 1951 was appended to the minimum fixed in 1956 also; that is that the quantum of unit would depend on the custom and usage in the largest number of tanneries in the locality.

The petitioner asked for a writ of *certiorari* in W.P. No. 1324 of 1956 to set aside G.O. 4192, dated 25th September, 1956. The relief asked for in W.P. No. 1325 of 1956 was the issue of a writ of *mandamus*, directing the Government to standardise the quantum of unit for all the tanneries in the State. The questions involved in both the writs are virtually the same, and both the petitions could be disposed of together.

Learned counsel for the petitioner urged that the quantum of unit, on which depended the minimum wage that was payable, was not defined with any precision in the notification that was issued in 1956. Learned counsel further pointed out that the notification itself did not provide for any machinery to determine the quantum with precision, should there be a dispute between the management of any tannery and the employees therein. No doubt factually the representation by the learned counsel for the petitioner, that there was no machinery provided in the terms of the notification itself to resolve disputes, if any, is correct. It should, however, be remembered that what happened in 1956 was only to enhance the minimum rate from 10 annas to 12 annas. The unit for which that payment was to be made remained the same. That had been already defined in 1950, and the unit had to be fixed with reference to custom and usage in the largest number of tanneries in the locality. Certainly there was no averment in the affidavits filed by the petitioner to show that there had been any difficulty in implementing the

directions in the G.O. of 1950, or in ascertaining what the quantum of the unit was as far as the petitioner's tannery at Dindigul was concerned. Though, as I have pointed out, the notification itself did not provide for any machinery to resolve disputes to determine the quantum of the unit, it could not be denied that, if there had been a dispute, it could have been referred as an industrial dispute for adjudication under the terms of the Industrial Disputes Act. But in this case there does not appear to have been any dispute at all. I am, therefore, unable to accept the plea of the petitioner, that the terms of the G.O. of 1956 are unworkable in the absence of any definition with precision of the quantum of the unit itself. The quantum of the unit dependant upon the usage and custom of each locality was. obviously something well-known both to the management and the workers in the case of the petitioner, and there was no difficulty in knowing what that unit was.

The learned Additional Government Pleader drew my attention to the representations made by the petitioner to the Government, wherein he referred to the different concepts of units in the various tanneries not only at Dindigul but elsewhere.

As a ground of attack on the validity of the notification of 1956 the plea, that the unit of work for which the minimum wage was prescribed was not defined with precision, fails.

The next contention of the learned counsel for the petitioner was that the effect of the notification resulted in discrimination, prohibited by Article 14 of the Constitution. Section 3 itself permits the Government to fix minimum wages either for a State as a whole or for the locality. In fact the general idea would appear to be to fix minimum wages for the State. The proviso permits minimum wages being prescribed for each locality. It was certainly within the jurisdiction of the Government to fix the minimum wages for the industry in the State as a whole. I am unable to see any real basis for a contention, that they would be under a legal liability or legal duty to fix minimum wages for each locality. It should be remembered that the notifications were issued fixing minimum wages for workers in tanneries after following the procedure prescribed by the Act and the rules thereunder, and the petitioner among others had opportunities of making their representations. It is no doubt true that the quantum of the unit appears to be less at Dindigul than at many of the other places, with the result that for procuring the same outturn of tanned hides and skins the petitioner may have to pay more to his workers than tanners in other localities. But that cannot amount to a denial of equal protection of laws within the meaning of Article 14. The Act itself, as I said, provides for minimum wages being fixed either for the State taken as a unit or for each locality. I am unable to hold that the Government acted in excess of its jurisdiction or erroneously exercised its jurisdiction in deciding to fix the minimum wages for the tanning industry for the State as a whole. That the incidence of the wage bill on the petitioner is heavier than on other tanners in other localities may not be an argument to sustain the plea, that Article 14 has been contravened by the impugned notification.

On neither of the grounds put forward by the leanred counsel for the petitioner can the G.O. of 1956 be set aside. The rule *nisi* issued in W.P. No. 1324 of 1956 is discharged and the petition is dismissed.

Since the validity of the notification has been upheld in W.P. No. 1324 of 1956, the prayer for the issue of a writ of *mandamus* in W.P. No. 1325 of 1956 also fails. The *rule nisi* issued in W.P. No. 1325 of 1956 is discharged and the petition is dismissed.

No order as to costs in either of the petitions.

V.S. *Rule Nisi discharged : Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

D. Philipose .. *Petitioner**

v.

Additional Commissioner for Workmen's Compensation and another .. *Respondents.*

Madras Shops and Establishments Act (XXXVI of 1947), section 4 (1)—Classification of workers under —Exclusion of touring employees—If bad as discriminatory.

Having regard to the object and the general scheme of the Madras Shops and Establishments Act, 1947, it is quite proper and reasonable to make a distinction between employees whose duties involve touring or travelling and employees whose duties do not involve any such travelling, as a clear line of demarcation exists between the two.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit herein, the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the order, dated 13th November, 1958 and made in M.S.E. No. 361 of 1958 on the file of the Additional Commissioner for Workmen's Compensation and to quash the said order.

A. K. Balakrishnan, S. Jayaraman and *K. G. Kannabiran,* for Petitioner.

Respondent not represented.

The Court made the following

ORDER.—The petitioner was an employee of the second respondent Company. In June, 1938, he was appointed as temporary Advertising Supervisor. Subsequently he worked in various capacities, and eventually in 1958 he was holding a post which involved travelling. On 11th July, 1958, he was served with a charge-sheet by the Head Office of the Company at Calcutta, in which it was alleged that he had threatened to assault a co-employee. On this charge the Company dismissed the petitioner. Against the order of dismissal he appealed to the Labour Commissioner under section 41 of the Madras Shops and Establishments Act, 1947. Before the Labour Commissioner the Company put forward the contention that the petitioner was a person who came within the meaning of clause (*b*) of sub-section (1) of section 4 of the Act, and that, therefore, the appeal was not competent. The Commissioner referred to Exhibit R-4 from which he extracted the following passage :

> "The present serves to inform you that you should consider, as your headquarters, Madras City, as from Monday the 19th May, 1958. Your work shall consist in working the local market when required and also help our medical representative and visit dealers in the suburbs of Madras."

On this he observed :—

> "It is clear from the above instructions, that the respondent company did not transfer the applicant to a non-travelling job and they did not intend to discontinue his travelling work even while he was at Madras, as he was required to work the local market in Madras City and visit dealers in the suburbs of Madras. In fact, it is not the applicant's case that his designation as a traveller was changed or that he could refuse to go out, when he was required to go out. The applicant has also admitted during cross-examination that he has to canvass orders if directed to do so by the management, that the area of his activities could be changed by his Manager, that he could not refuse to go out of Madras City if he was asked to go out, because it was part of his duties and that he continued to be under the impression that he was a traveller. I am therefore satisfied on the materials placed before me that the applicant continued to be employed as a canvasser even after his coming to Madras in May, 1958 and the nature of his employment was such that travelling was a necessary condition of his work. I therefore find that the applicant's work did involve ' travelling'.

In this view he declined to entertain the appeal. The present petition has been filed for the issue of an appropriate writ to quash the order of the Additional Commissioner for Workmen's Compensation.

The principal point taken before me is that when the Legislature excluded the various classes of persons enumerated in sub-clause (1) of section 4 from the

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*W.P. No. 40 of 1959. 25th February, 1959.
(6th Phalguna 1880 Saka).

scope of the Act, it was not adopting a reasonable basis of classification which can be justified by reference to the objects and purpose of the enactment, and that, therefore, the exclusion at least so far as persons in the category to which the petitioner belongs is concerned, is bad. I am unable to agree. Chapter 2 of the Act contains various provisions fixing the hours of work and the holidays during which a shop should remain closed. Similar provisions are made in Chapter 3 in respect of establishments other than shops. Chapter 4 deals with employment of children and young persons. Chapter 5 deals with health and safety. Chapter 6 provides for holidays with wages. It seems to me that for the purposes for which the statute makes provision it would be perfectly proper and reasonable to make a distinction between employees whose duties involve touring or travelling and employees whose duties do not; a clear line of demarcation between the two exists. An employee whose duties do not involve travelling may be required to attend at particular hours and work between particular hours. But it would be impossible to do that in respect of an employee whose duties involve travelling. If the hours of work of an employee whose duties involve travelling are fixed say as between 10 A.M. and 5 P.M. he would be entitled to say that he is not bound to travel outside those hours even though it may be that no train or plane or other conveyance is available during those hours. Again an employee whose duties do not involve touring can be controlled more directly by the man above him in the Office ; but an employee who has to travel must be left largely to his own ingenuity, resourcefulness and self-help. In that case various allowances will have to be made on account of the expenses that they have to incur. In fixing their salary the circumstance will have to be taken into account that a considerable part of their time is spent outside headquarters and away from home. I am not prepared to say that the classification to which exception has been taken is not legitimate. It seems to me further that even if it can be said that the classification is not reasonable, the petitioner would not be entitled to any relief unless the Act is extended to persons in his category. This Court has no jurisdiction to do that.

This petition is dismissed.

R.M. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

Issardas Somamal Lulla .. *Petitioner**

v.

Collector of Madras and Additional Custodian of Evacuee Property, Madras .. *Respondents.*

Constitution of India (1950), *Article* 226—*Writ of* certiorari—*When could be issued—Order of inferior tribunal without jurisdiction—Person against whom such order is made—If an aggrieved person.*

Although *certiorari* is not a writ of course, it will be issued in proper cases *ex debito justiciae*. Where a member of the public moves the Court for the issue of a writ, having no personal or particular interest in regard to the subject-matter, it is purely in the discretion of the Court to issue the writ or not. But where a party aggrieved by an order of an inferior tribunal moves the Court for the issue of a writ of *certiorari*, the Court is bound to issue the writ unless the party has, by reason of his own conduct, disentitled himself to the discretionary relief.

Where an inferior tribunal exceeds its jurisdiction, apart from the question of the subsistence of any right, a party to the proceedings before such tribunal will be entitled to apply for the issue of a writ of *certiorari* as he would be a person aggrieved by reason of the fact that he contested the matter before the tribunal and his contest was overruled.

Where the petitioner applied under Article 226 of the Constitution to quash the order of the Collector purporting to cancel an import quota right allowed to him, even though the question whether the person ever acquired such a right was in dispute he could still be entitled to invoke the jurisdiction of the Court under Article 226 of the Constitution if he has been a party to the proceedings before the Collector.

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* Writ Petition No. 5 of 1959. 5th March, 1959. (4th Chaitra of Saka 1818).

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the order, dated 29th December, 1958, in Proceedings Ac. A. 2/104/58 on the file of the Collector of Madras and the Additional Custodian of Evacuee Property, Madras, cancelling the permanent allotment and the renewal lease of the Import and Export quota rights given to the petitioner and quash the said order.

K. V. Venkatasubramania Iyer and *P. P. Selvarajan,* for Petitioner.

The Additional Government Pleader (*K. Veeraswami*) on behalf of the Respondent.

The Court made the following

ORDER.—This is an application under Article 226 of the Constitution to call for the record relating to the order dated 29th December, 1958, in Proceedings Ac. A.2/104/58 of the respondent, which purported to cancel the permanent allotment of the export and import rights and the renewal of lease of import and export rights given to the petitioner.

The petitioner is a displaced person from West Pakistan. By the proceedings dated 17th April, 1947, the Additional Custodian of Evacuee Property, Madras, granted to the petitioner, the proprietor of Messrs. Oceanic Agencies, a lease of the import and export quota rights possessed by Sri Hussain Kasam Dada, who had been declared to be an evacuee. That lease was granted under section 10 of the Administration of Evacuee Property Act, 1950, and was for a period of one year. It was then renewed for a further period of one year on 16th February, 1958. Under instructions from the Regional Settlement Commissioner, Bombay, the Assistant Custodian of Evacuee Property enquired of the petitioner on 26th February, 1958, whether he would prefer to get the Export and Import quota rights permanently allotted to him for a capitalised value of Rs. 4,000 on certain terms and conditions. The petitioner expressed his willingness and accepting the offer deposited a sum of Rs. 3,200 after deducting Rs. 800 already paid as the premia for the temporary lease and the renewal thereof. This deduction was made on the strength of a letter of the Assistant Custodian who agreed that credit would be given for the premia in case the petitioner decided to take the permanent quota for the sum of Rs. 4,000. It is stated on behalf of the petitioner, that his acceptance resulted in a concluded contract, under which he was entitled to the permanent quota rights.

The respondent, has contested that position. He stated that the Assistant Custodian only recommended to the Regional Settlement Officer the permanent allotment of quota right to the petitioner, but that no reply had been received from the Regional Settlement Officer accepting the same and that therefore there was no concluded contract. It is then said that certain complaints were received by the Additional Custodian of Evacuee Property from which it was ascertained that the petitioner's family really owned four firms in different names, under which they were able to acquire four distinct quota rights all of them for the benefit of the same family. In those circumstances, the Additional Custodian of Evacuee Property issued a notice dated 15th November, 1958, calling upon the petitioner to show cause why the permanent allotment offered to the petitioner should not be cancelled, as he and his brother-in-law had fraudulently obtained allotment of the good-will of several firms without divulging their relationship *inter se* and as the allotment standing in different names were ultimately run for the benefit of a single family thus monopolising the benefit of several allotments in excess of his requirement and also for the reason that the petitioner had been trafficking in the licences issued without actually importing the goods, thus violating the import trade control regulations. The notice also mentioned about the violations of the conditions of the lease granted to the petitioner, and called upon the petitioner to show cause within a week from the receipt of the notice as to why the permanent right offered to him should not be cancelled. In the notice there is no mention of the cancellation of the lease although the non-compliance with the conditions of the lease were

adverted to in the preamble to the notice. The petitioner offered his explanation and was also given a personal hearing. It was found by the Collector of Central Excise that one family was virtually running the business, and various allotments were obtained by them without disclosing the relationship. After referring to certain malpractices the respondent proceeded to pass an order on 29th December, 1958, cancelling the allotment made by the letter dated 14th February, 1958. The right of the petitioner to import and export licence from 17th April, 1958, which had been issued by the control authorities was also forfeited.

The petitioner has thereupon filed this petition seeking to quash the order of the Collector.

The learned advocate for the petitioner contended that the respondent had no jurisdiction to cancel the permanent allotment which was made under the Displaced Persons (Compensation and Rehabilitation) Act, 1954, the Collector not being an authority under the Act, but only an agent for the Settlement Commissioner at Bombay. It was further contended that the Administration of Evacuee Property Act of 1950 could only relate to immovable property as section 2 (*a*) of the Act would show, and could not properly cover the subject-matter of an intangible right as the Export and Import quota right, and that therefore, the Collector as the Custodian of Evacuee Property would have no jurisdiction to pass any order of forfeiture of the import quota.

On behalf of the respondent it was stated in the counter-affidavit that there was no valid contract or permanent allotment. That position was further clarified before me by the learned Additional Government Pleader. He stated that neither under the appropriate provisions of the Displaced Persons (Compensation and Rehabilitation) Act of 1954, nor in the factual circumstances of the case was there any contract between the parties. Both the parties therefore in effect stated that the order of cancellation of the permanent quota rights was without jurisdiction. The petitioner contended that he had acquired the right but that the cancellation of it was wrong as having been done by an authority not being competent to do the same.

On the other hand the Government contended there was no permanent allotment of the quota right at all, and therefore there was nothing to cancel. The learned advocate for the petitioner was not, however, able to substantiate his contention that there has been an allotment of the permanent quota right by the appropriate authority under the Displaced Persons (Compensation and Rehabilitation) Act of 1954. He stated that whatever the position may be, he is confining his objection to the validity of the purported cancellation of the quota rights by the respondent, and that the petitioner would take appropriate proceedings for the purpose of obtaining his rights recognised by the authorities.

The learned Additional Government Pleader does not concede that the petitioner has at all any rights. But at the same time he stated that there was no necessity to cancel, as there was no allotment of the quota rights. Without, therefore, deciding the question as to whether there was a valid allotment of the permanent quota right in favour of the petitioner by the Assistant Custodian of Evacuee Property, it must be held that the cancellation of the same by the respondent is without jurisdiction.

The learned advocate for the petitioner next contended that in the notice issued to his client, there was no mention of cancelling the renewed lease dated 14th February, 1958, and that therefore the respondent had no power to cancel the lease for any alleged breach of the conditions thereof. In this the learned advocate for the petitioner is supported by the terms of the notice. There was no valid termination or cancellation of the lease.

It is next contended as no valid rights by way of permanent allotment had been created in favour of the petitioner, he would not be a person interested, so as to invoke the jurisdiction of this Court under Article 226 of the Constitution. Although the question whether the petitioner is entitled to the right claimed is not

being decided by me, I am of opinion that he would be entitled to move the Court under Article 226 of the Constitution as a person aggrieved.

In 11 Halsbury's Laws of England, Simonds Edition, at page 139, it is stated that the order of *certiorari* is granted as *of course* upon the application of the Attorney-General acting on behalf of the Crown, in all cases in which the Court has jurisdiction over the subject-matter of the proceedings in the inferior Court. In other cases, the order is stated to be discretionary. In regard to an application by a party aggrieved it states thus :—

"Although the order is not of course it will though discretionary nevertheless be granted *ex debito justitiae* to quash proceedings which the Court has power to quash, where it is shown that the Court below has acted without jurisdiction or in excess of jurisdiction, if the application is made by aggrieved party and not merely by one of the public and if the conduct of the party applying has not been such as to disentitle him to relief and this is the case even though *certiorari* is taken away by statute and although there is an alternative remedy."

This matter has been elucidated in *The Queen* v. *The Justices of Surrey*[1]. In that case a question arose as to the propriety of a certificate granted by two Justices that a highway was no longer required to be repaired by the parishes. One of the inhabitants of the parishes concerned applied for a writ of *certiorari*. It was found that as notice was not affixed at a particular place as required by the statute, the orders complained of were made without jurisdiction. The question then arose as to whether the orders having been found to be without jurisdiction, a writ of *certiorari* could be issued to quash it. It was held that although *certiorari* was not a writ *of course*, yet as the applicant had by reason of his local situation a peculiar grievance of his own, and was not merely applying as one of the public, he was entitled to the writ *ex debito justitiae*. At page 472, Blackburn, J. observed as follows :

"In the very analogous case of prohibition a distinction is taken, thus expressed by Cockburn, C.J., in *Forster* v. *Forster*[2] 'I entirely concur in the proposition that, although the Court will listen to a person who is a stranger, and who interferes to point out that some other Court has exceeded its jurisdiction, whereby some wrong or grievance has been sustained, yet that is not *ex debito justitiae*, but a matter upon which the Court may properly exercise its discretion, as distinguished from the case of a party aggrieved, who is entitled to relief *ex debito justitiae*, if he suffers from the usurpation of jurisdiction by another Court."

"The same distinction between an application by a party aggrieved and by one who comes merely as a stranger to inform the Court, is taken as to *certiorari* in *Arthur* v. *Commissioners of Sewers*[3], where one of the Judges said 'that a *certiorari* was not a writ of right, for if it was it could never be denied to grant it; but it has often been denied by this Court, who, upon consideration of the circumstances of cases, may deny it or grant it at discretion; so that it is not always a writ of right. It is true where a man is chosen into an office or place, by virtue whereof he has a temporal right, and is deprived thereof by an inferior jurisdiction who proceed in a summary way, in such case he is entitled to a *certiorari ex debito justitiae*, because he has no other remedy, being bound by the judgment of the inferior judicature.

Where the party aggrieved has by his conduct precluded himself from taking an objection, the Court will not permit him to make it as in *Reg* v. *South Holland Drainage Committee*[4].

In other cases where the application is by the party aggrieved, so as to answer the same purpose as a writ of error, we think that it ought to be treated like a writ of error, as *ex debito justitiae* ; but where the applicant is not a party grieved (who substantially brings error to redress his private wrong) but comes forward as one of the general public having no particular interest in the matter, the Court has a discretion, and if it thinks that no good would be done to the public by quashing the order it is not bound to grant it at the instance of such a person".

Thus a writ of *certiorari* is issued at the discretion of the superior Court. It cannot be held to be a writ of right or one issued as a matter *of course*. But for the exercise of the discretion of the Court, there are some well-accepted principles. In issuing the writ, if the Court is moved by a member of the public having no personal or particular interest in regard to the subject-matter, the matter would be one, entirely for the discretion of the Court. But if on the other hand it is moved by a party aggrieved by the order of the inferior Tribunal, the Court is bound to

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1. (1870) 5 Q.B.C. 466.
2. (1863) 4 B. & S. 187 at 199 : 122 E.R. 430.
3. 8 Mod. 331 : 88 E.R. 237.
4. (1838) 8 Ad. & E. 429 : 112 E.R. 901.

issue the writ at his instance, except in cases where he had disentitled himself to the discretionary relief by reason of his own conduct like submission to jurisdiction, laches, etc.

In *The King* v. *Groom and others* : Ex parte *Cobbold and others*[1] a question arose whether the issue of a liquor licence made at an adjourned meeting held beyond the period limited by the statute was valid. On the facts of the case an application for cancellation by the issue of a writ of *certiorari* was found to have been moved by a person, who was a rival in the trade.

Lord Alverstone, C.J., stated that if he could see his way to decide against the applicants for a *certiorari*, he would be glad to do so as the point raised was only technical in nature. That eminent Chief Justice held that writ should be issued notwithstanding the fact that the application was only at the instance of a rival. After having found that the licence having been issued beyond the period permitted by the statute, the learned Chief Justice held thus at page 162:

"As to the question whether the applicants for the rule are persons aggrieved, there can be no doubt that they have no real grievance arising from the omission to serve the notice in time. That, however, is not the sense in which persons applying for a *certiorari* are required to be persons aggrieved. It is sufficient if they have a real interest in the decision of the justices, and they have in this case. They took the point now raised before the justices at the adjourned general annual licensing meeting and when the confirming order was made, and it would be too wrong to say that they had a sufficient interest in the matter to enable them to apply for the rule".

This decision would indicate that a party to the proceedings who took the objection in the proceedings before the inferior Tribunal would be an aggrieved person who would have sufficient interest to maintain an application for the issue of a writ of *certiorari.*

In *The King* v. *Richmond Confirming Authority* : Ex parte *Howitt*[2] an application for licence for the sale of intoxicating liquor was granted in favour of the Secretary of a Company. That application was opposed by a rival. Before the confirmation of the licence the Secretary in whose favour the licence was granted died. The licensing authority issued the licence in the name of the succeeding Secretary. The propriety of this order was challenged by way of the writ of *certiorari* at the instance of the rival who opposed the grant of licence. It was contended on behalf of the respondent that as the applicant was only seeking to take advantage of what utmost was only a highly technical irregularity and where no substantial injustice was done the rule should not be issued. It was further contended that the applicant could not be treated as an aggrieved person as there was only a substitution of one name, namely, the Secretary of the Company, by another. It was held that the applicant did not stand in the same category of a member of the public, who might be said to have only a general interest in saying that the law should be properly carried out, but that he had a particular interest in the subject-matter and nothing better could show that fact than that he incurred expenses of instructing the counsel to secure the refusal of confirmation and to contend that the confirming authority had no jurisdiction. The fact, that the applicant was a person who was entitled to appear and object to the grant of licence entitled him to move for the issue of a writ of *certiorari.*

The King v. *Postmaster-General*: Ex parte *Carmichael*[3], decided that if the application for *certiorari* was made by a party aggrieved it ought to be granted *ex debito justitiae* and that the Court had not the general discretion which it would have when the application was made by one of the public who was not personally concerned.

It is therefore, clear that, where an inferior Tribunal has exceeded its jurisdiction apart from the question of the subsistence of any right, a party to the proceeding before the inferior Tribunal will be entitled to apply for the issue of a writ of *certiorari.* He would be a person aggrieved by reason of the fact that he contested

1. L.R. (1901) K.B. 157.
2. L.R. (1921) 1 K.B. 248.
3. L.R. (1928) 1 K.B. 291.

the application before the Tribunal and that contest was overruled. In such a case there is no question of discretion of the Court except where he by his own conduct had disabled himself from applying for a writ.

I am, therefore, of opinion that even though it has not been decided in this case that the petitioner acquired any right to the quota right that had been claimed by him he having been a party to a proceeding before the respondent would be entitled to apply under Article 226 of the Constitution as a person aggrieved by that order. In such a case the writ should be issued to quash an order passed without jurisdiction, *ex debito justitiae.* No question of discretion can arise in the matter as it is not contended that the petitioner has precluded himself from applying to this Court by reason of any conduct on his part.

I therefore, make the rule *nisi* absolute. There will, however, be no order as to costs.

R.M. ——— *Rule absolute.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

P. S. Aravamudha Iyengar .. *Appellant**

v.

The State of Madras .. *Respondent.*

Prevention of Corruption Act (II of 1947), *section* 5 (2) *and Penal Code (XLV of* 1860), *section* 161—*Same act constituting offences under both the provisions—Sentence under both—Sustainability—General Clauses Act (X of* 1897), *section* 26—*Section* 4 (1) *of Act (II of* 1947)—*Presumption under—Obligatory.*

In a charge against a public servant of asking for and taking a bribe to secure an employment it makes no difference whether such public servant was in a position to appoint that person or not. Once it is proved that the bribe has been given, in view of section 4 (1) of Act (II of 1947), a presumption at once arises that the accused accepted the gratification as motive or reward. The Legislature has by the words " shall presume " used in section 4 (1) of the Act, made it obligatory on the Court to raise a presumption in every case brought under the Prevention of Corruption Act that the accused received and accepted the money as an illegal gratification unless he rebutted the same. The burden of proof required to be discharged by the accused in such cases is less than that required at the hands of the prosecution in proving the case beyond reasonable doubt and the burden may be discharged by the evidence satisfying the Court of probability of that which the accused is called upon to establish. Where the onus is placed on the accused person it may be discharged by proving what would be enough to support a verdict in his favour in a civil action and in civil cases the preponderance of probability may constitute sufficient ground for verdict.

[In the instant case it was found that the explanation given by the accused did not amount to that reduced amount of proof.]

The essential elements of an offence under section 5 (2) of the Prevention of Corruption Act and section 161 of the Indian Penal Code are the same and a conviction under both the sections will be correct though there cannot be separate sentences by reason of General Clauses Act (X of 1897), section 26.

Appeal against the Judgment of the Court of the Special Judge, Tiruchirapalli, in C.C. No. 2 of 1958.

V. T. Rangaswami Iyengar and *K. Kalyanasundaram*, for Appellant.

V. V. Radhakrishnan for the Public Prosecutor (*P. S. Kailasam*) on behalf of the State.

The Court delivered the following

JUDGMENT.—This appeal is preferred against the conviction and sentence by the Special Judge, Tiruchirapalli, in C.C. No. 2 of 1958.

The accused P.S. Aravamuda Ayyangar was employed as Progress Supervisor, Golden Rock Workshop, Southern Railway. It is in evidence that notwithstanding the fact that at the time of the commission of the offence in question the accused was

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* Crl. Appeal No. 128 of 1958. 17th November, 1958. (26th Karthika 1880, Saka).

getting a salary of Rs. 320 *plus* Rs. 70 dearness allowance, per month, and his wife seems to be a musical instructor having occasional engagements in the All India Radio also, he was not in flourishing circumstances. Till May, 1957, his salary stood attached in execution of a simple money decree and he was getting only between Rs. 156 odd and Rs. 197 odd by way of nett salary. It is also possible that the accused was leading a standard of life a cut above his resources. But in these cases of corruption it is not possible, however to find out the motive, because incorruptibility depends upon the strength of character and not upon the financial resources. It is within our common experience that many low-paid servants are incorruptible and many high-paid servants are corrupt. It is not possible therefore for us to delve into the minds of these people taking bribes, because as has been well said "The devil himself knoweth not the thoughts of man". In this case, however, we have the evidence that the accused was not in such financial circumstances that he would be above all temptation. It is also possible that when he is on the verge of retirement he wanted as much money as possible when the going was good, because nobody would give him bribes after retirement.

Chenniyappan P.W. 2 resides near Erode. In June, 1957, he came to Golden Rock to find out if he can get employment as a kalasi in the Golden Rock Workshop. He made enquiries of some persons in Golden Rock about the job and learnt that if he contacted the accused who was residing in H-1 Quarters, Golden Rock, he would be able to do something for him. It may be parenthetically pointed out here that much point was made and rightly disbelieved by the lower Court that the accused was not in a position to recruit kalasis a job for which this untrained P.W. 2 was eligible. But unfortunately in this country of illiterates and needy people out to secure a job by hook or by crook, people who are in a position to give job as well as people who pretend that they will be able to secure a job for the applicants by *siparsu* or otherwise, take money and this is a notorious fact of which judicial notice can be taken. Therefore, P.W. 2 met the accused at 6-30 P.M. on a day in June, 1957, at his requested and required him to advise him how he can get the job of a kalasi. The accused told him that when vacancies arose it will be notified and that if P.W. 2 applied when vacancies were notified he would be sent for. P.W. 2 went to Golden Rock on 2 or 3 further occasions but he was not able to get any information. In the 1st week of August, 1957, P.W. 2 met accused for the second time at his house and asked him if recruitment was likely in the near future. Accused told P.W. 2 that, in a month or two, candidates are likely to be recruited and if P.W 2 agreed to pay him (accused) Rs. 100 before the end of that month and a further sum of Rs. 100 after P.W. 2 got the appointment, he would help P.W. 2 in getting an application form and also in getting him selected. To this, P.W. 2 who was hard pressed for securing a job readily agreed.

On 19th August, 1957, on information that accused was receiving illegal gratification for securing jobs in the Railway Workshop, Sri A. Devasahayam (P.W. 7) the Inspector of Police, Special Police Establishment, Madras, proceeded to Erode, stayed at the Retiring Room in Erode Railway Station and sent for P.W. 2. P.W. 2 met P.W. 7. I may point out here that on account of the growing civic consciousness in this country, it is very fortunate for us that people who give bribes also co-operate with the authorities for the exposure of the bribe-takers, once they are convinced that it is their duty to do so. Therefore on being questioned by P.W. 7, P.W. 2 told him the gist of the conversation between himself and the accused and the demand made by the accused for payment of Rs. 200 for securing him the job of a kalasi. P.W. 7 asked P.W. 2 to give a written complaint. P.W. 2 consented to the same. The complaint is Exhibit P-2 recorded by P.W. 7. P.W. 7 thereupon arranged for a trap being sprung and took preliminary steps.

P.W. 7 after directing P.W. 2 to meet the accused on 21st August, 1957 and find out if the accused asked for the money and if so meet him on 22nd August, 1957 night at the Tiruchirapalli Junction Railway Station, sent Exhibit P-2 to the Superintendent of Police, Special Police Establishment at Madras, requesting for an authorisation letter to the Additional First Class Magistrate, Tiruchirapalli, to

permit him (P.W. 7) to investigate into the case. P.W. 7 got the letter from Sri C. V. Narasimhan, Superintendent of Police, Special Police Establishment authorising him to investigate into the case. The Additional First Class Magistrate, Tiruchirapalli, passed an order Exhibit P-8 authorising P.W. 7 to investigate into the case. Exhibit P-9 is the first information report which P.W. 7 sent to the Court. P.W. 7 registered the case as Crime No. 15 of 1957 on 23rd August, 1957.

In the meanwhile on 21st August, 1957, P.W. 2 proceeded to Golden Rock and was sitting in the Park near the house of the accused. At about 11-30 A.M. the accused returned home. P.W. 2 met the accused and the latter enquired him if he had got the money. P.W. 2 told him that he would pay the money day after next. The accused told P.W. 2 to wait for him in the same place and time on the day after next.

On 22nd August, 1957, at about 8 P.M. P.W. 2 met P.W. 7 at about 8 P.M. at the Tiruchirapalli Junction Railway Retiring Room and informed P.W. 7 of the conversation between himself and the accused. P.W. 7 instructed P.W. 2 to meet him at 7-30 A.M. on 23rd August, 1957, with Rs. 100. Nataraja Mudali P.W. 3 is the Karnam of Thayanur. He resides in Beemanagar, a suburb of Tiruchirapalli. P.W. 7 sent for P.W. 3 through a Railway Police Constable. P.W. 3 met P.W. 7 at 9 P.M. on 22nd August, 1957, in the Railway Retiring Room, Tiruchirapalli Junction. P.W. 7 directed P.W. 3 to meet him on the next day at 7-15 A.M. in his room. P.W. 3 met P.W. 7 at the retiring room as arranged. At about 7-45 A.M. P.W. 2 met P.W. 7 at the Railway Retiring Room taking with him ten-ten rupee currency notes, M.Os. 1 to 10, and a change of eight annas towards bus fare. P.W. 2 handed over M.Os. 1 to 10 to P.W. 7 who prepared a Mahazar noting the number of M.Os. 1 to 10 in the presence of P.W. 3. P.W. 2 signed the Mahazar Exhibit P-3. P.W. 3 attested it. P.W. 7 directed P.W. 2 to proceed to the place mentioned by accused on 21st August, 1957 and give M.Os. 1 to 10 if accused demanded the money and then signal to him as pre-arranged by dropping his towel and retrieving it back. P.W. 2 agreed and went to Golden Rock by bus. Before P.W. 2 went for Golden Rock P.W. 7 searched his person and found that there was no incriminating material. Some time later P.W. 7 instructed P.W. 3 to follow P.W. 2 and stay somewhere nearby without drawing any attention to himself, and watch what was happening. P.W. 3 left for Golden Rock. P.W. 2 sat on a bench in between the Armoury Gate of the Golden Rock Workshop and the Park, at the place indicated by the accused the day before. P.W. 3 went to the same place and sat on a bench by the side of the road in the opposite direction and a little away from the place where P.W. 2 was sitting, as if he was a casual wayfarer resting there, but sufficiently near to see what was happening. By 8-45 P.M. P.W. 7 left for Golden Rock by bus, got down at Park Bus stop. There he met Sri J. M. Davis (P.W. 4) a B.A. B.T. employed as an assistant in the Golden Rock Railway High School, who was on his way back from the Railway Hospital. P.W. 7 disclosed his identity to P.W. 4 and requested him to assist him in a trap against an official. After some reluctance P.W. 4's sense of duty overcame the unpleasantness of the duty he was asked to discharge and he consented. P.Ws. 4 and 7 took their position near the eastern gate of the Park, a few yards west of the place where P.W. 2 was sitting. Thus, the stage was set for a trap being sprung.

At about 11-15 A.M. accused came out of the Golden Rock Workshop through the Armoury Gate and was walking towards the Park. Accused was wearing a dhoti and a slack shirt. Some one leading a cycle was accompanying him. On seeing the accused P.W. 2 got up and made a Namaskar. The accused asked P.W. 2 to follow him. After they had gone a few feet west, the person who had the cycle got on it and proceeded along the Post Office Road. Accused enquired P.W. 2, who was trotting along, if he had brought the money. P.W. 2 told the accused that he had arrived just then and he had brought the money. The accused asked P.W. 2 to give the sum of Rs. 100. P.W. 3 slowly followed accused and P.W. 2 from behind. P.Ws. 4 and 7 were observing the movements of the accused and P.W. 2.

Thus, while three pairs of eyes were being trained on him at unsuspectingly fairly close quarters P.W. 2 took the sum of Rs. 100, M.Os. 1 to 10, and gave them

to the accused. The accused received them with his right hand and put M.Os. 1 to 10 into the left side pocket of his slack shirt. Accused told P.W. 2 not to worry about the job, that he would attend to it, that P.W. 2 was to keep himself in touch with him and that as soon as there were vacancies P.W. 2 would be given an application form and that he (accused) would see that P.W. 2 got selected. The accused also told P.W. 2 that if any other persons desired to get the job of kalasis, P.W. 2 might take them to him and that he would oblige them also for similar considerations. By this time P.Ws. 3, 4 and 7 closed upon this accused. In fact they could even overhear part of the conversation between the accused and P.W. 2 and as soon as accused had proceeded about 25 feet along the Southern bend of the road, round the Park, P.Ws. 4 and 7 stopped the accused.

P.W. 7 revealed his identity to the accused and called upon him to produce the currency notes received by him from P.W. 2. By that time P.W. 3 had joined them. The accused took out the currency notes M.Os. 1 to 10 from the left saide pocket of his slack shirt and gave them to P.W. 7. P.W. 7 verified the numbers in M.Os. 1 to 10 with the numbers recorded by him in the Mahazar Exhibit P-3 and found the numbers tally. The currency notes were seized under a Mahazar Exhibit P-5. This Mahazar has been attested by P.Ws. 3 and 4. P.W. 7 searched the person of the accused but did not find anything incriminating.

P.W. 7 interrogated the accused and examined the P.Ws. There are no irregularities in the investigation and in fact a model procedure has been followed in this case. I need not point out that irregularities in investigation unless they have brought about a miscarriage of justice will not vitiate the result. *Ramchand Tolaram* v. *The State*[1]; *Vaghji Nanji* v. *State*[2]; *Debi Prasanna* v. *State*[3]; *Mubarack Ali*[4]; *M. P. State* v. *Veereshwar Rao*[5]; *Warriappan*[6]; on completing the investigation he submitted his report to the Inspector-General of Police, Special Police Establishment, New Delhi. He applied for sanction to prosecute the accused to the General Manager, Southern Railway. The facts relating to the charge were placed before the General Manager and sanction accorded by the General Manager not mechanically but applying his mind has been proved through P.W. 1. The sanction is in conformity with the settled law on the subject. *Brahim Sarup* v. *The State*[7]; *Ravi Dutt* v. *State*[8]; *Nizhal Singh* v. *State*[9]; *Rameshwar Dayal Lakhpat Rai* v. *State*[10] *Mohanlal*[11] *Baynath*[12]; *Bangiram*[13]; *Indu Bhushan*[14]; *Jaswant Singh*[15], *K.N.N. Ayyangar* v. *State*[16]; *Hiranand*[17]; *State* v. *Mehra*[18]. The charge-sheet was laid on 24th December, 1957.

These facts were proved through the seven witnesses examined on behalf of the prosecution and by Exhibits P. 1 to P. 9 and M.Os. 1 to 10.

The accused denied the offence and contended as follows : P.W. 2 did not meet him in connection with securing the job of a kalasi. The accused did not offer to get a job of kalasi to P.W. 2 if the latter agreed to pay him Rs. 200, Rs. 100 immediately and the balance of Rs. 100 after P.W. 2 got the job. On 23rd August, 1957, at about 11-15 A.M., while the accused was returning to his house from the Golden Rock Workshop P.W. 2 met him and gave him a sum of Rs. 100 consisting of M.Os. 1 to 10, which he received. But he did not receive them as bribe or as illegal gratification. Immediately afterwards P.W. 7 stopped him and asked him to produce the currency notes which P.W. 2 gave him and he produced M.Os. 1 to 10 from his slack pocket and gave them to P.W. 7. Accused knew P.W. 2 for the past four years. P.W. 2 used to go to him very often and take small loans and return the same on the promised dates. On 11th August, 1957, P.W. 2 came to him and

1. A.I.R. 1956 Bom. 287.
2. A.I.R. 1955 Sau. 91.
3. A.I.R. 1956 Cal. 56.
4. A.I.R. 1958 Madh. Pra. 166.
5. 1957 S.C.J. 519 : (1957) M.L.J. (Crl.) 482: A.I.R. 1957 S.C. 592.
6. A.I.R. 1958 Manipur 17.
7. A.I.R. 1953 All. 37.
8. 1956 Crl. L.J. 103 : A.I.R. 1956 Pepsu 12.
9. A.I.R. 1955 Punj. 65.
10. A.I.R. 1955 N.U.C. (M.B.) 852.
11. 1956 Crl. L.J. 879 : A.I.R. 1956 Bom. 504.
12. A.I.R. 1956 Bhopal 36.
13. 1957 Cr. L.J. 132.
14. A.I.R. 1958 S.C. 148.
15. (1958) S.C.J. 355: A.I.R. 1958 S.C. 124.
16. A.I.R. 1954 Madh. B. 101.
17. A.I.R. 1958 Madh. P. 2.
18. A.I.R. 1953 Ajmer 17.

asked him for a loan of Rs. 100 stating that P.W. 2 had spent the money given by his mother and promised to repay the same in 2 or 3 days' time. On 16th August, 1957, P.W. 2 met him and told him that he was not able to repay it as undertaken by him and promised to repay the same in two or three days' time. Accused abused P.W. 2 and sent P.W. 2 out of the house. On 21st August, 1957, P.W. 2 again came to accused's house and said that the loan amount was ready and that he would repay it on 23rd August, 1957. P.W. 2 asked the accused where he could give the money. Accused told him that he could repay the money wherever he chose and whenever he chose. Accordingly P.W. 2 paid the sum of Rs. 100 to the accused on 23rd August, 1957. Because he pressed P.W. 2 for repayment of the loan, P.W. 2 had given false evidence against him. He did not know P.W. 3 at all, that P.W. 3 was not present on 23rd August, 1957 and that P.W. 7 might have asked P.W. 3 to give evidence against him. P.W. 4 is a distant relation of P.W. 7, the suggestion of the accused being that P.W. 4 might have given evidence to oblige P.W. 7.

On behalf of the accused two witnesses were examined to support his case that he gave a loan of Rs. 100 to P.W. 2 and that it was this sum that P.W. 2 paid him on 23rd August, 1957. The learned Special Judge has exhaustively examined the evidence of D.Ws. 1 and 2 in paragraphs 12 and 13 of his judgment and has come to the conclusion that one has only to read their evidence to be convinced that both of them are speaking to unmitigated falsehoods. From the admissions of D.W. 1 it is seen that he had been prematurely retired from the Railway Workshop where he was employed in an inferior position and that he had been committed to civil prison for non-payment of a small decree debt. Further, D.W. 1 stated that the accused called his debtor by name Kanniyappan in chief examination, whereas the name of P.W. 2 is Chenniyappan. It is unnecessary to multiply the other details given by the learned Special Judge showing the worthless character of his evidence. Similarly, D.W. 2 was found to be an equally worthless witness and though he did not know in which village the accused owns lands, nevertheless he was willing to oblige the accused by saying that he had seen paddy and rice being brought to the house of the accused on numerous occasions and though he does not even own a Radio and cannot legitimately be expected to know anything about the accused's wife giving musical concerts, he had the temerity to claim knowledge of what the accused's wife was earning, etc. Though D.W. 1 is residing in Woraiyur and D.W. 2 is residing in Ponmalaipatti, they had the brazenness to say that they went to the house of the accused to witness P.W. 2 coming there without money and being abused by the accused and D.W. 2 recommending the loan of Rs. 100 to P.W. 2, an alleged gambler, who had lost the money. It is obvious that the testimony of these worthless witnesses D.Ws. 1 and 2 had been procured by the accused to speak to an improbable story that the incriminating goods with which this accused was caught represented the return of a loan.

But this need not detain us, however, because it is not for the accused to establish his innocence and it is for the prosecution to establish satisfactorily and affirmatively the guilt of the accused. That is the one golden thread which runs through the web of our Criminal Jurisprudence derived from the British : *Woolmingtom* v. *D.P.P.*[1] ; *Mancini* v. *D.P.P.*[2] ; *Kwatu Mensah* v. *The King*[3]. *Emperor* v. *Damapala*[4] ; *Parbhoo* v. *Emperor*[5]; *Stephen Senavirtane* v. *The King*[6] ; *Wanchope* v. *Emperor*[7] ; *Hasan Din* v. *Emperor*[8]. To be fair the learned advocate for the appellant here did not rely upon the defence evidence, seeing that it would not and did not at all commend itself to any Court.

In this state of evidence there cannot be the slightest doubt that the learned Special Judge came to the correct conclusion that the prosecution has affirmatively and satisfactorily proved its case against the accused for the offence of public servant taking illegal gratification (section 161, Indian Penal Code) and criminal misconduct punishable under section 5 (1) read with 5 (2) of Act II of 1947.) The

1. L.R. 1935 A.C. 462.
2. L.R. 1942 A.C. 1.
3. (1946) 1 M.L.J. 212 : A.I.R. 1946 P.C. 20.
4. A.I.R. 1937 Rang. 83.
5. A.I.R. 1941 All. 402 (F.B.).
6. A.I.R. 1936 P.C. 289.
7. A.I.R. 1933 Cal. 800.
8. A.I.R. 1943 Lah. 56.

requirements under section 161 will be found set out in the standard commentaries ; Dr. Sir Hari Singh Gour's "The Penal Law of India" 6th edition (1955), volume 1, page 668 and following ; V. B. Raju, I.C.S., "The Penal Code" (1957), page 524 and following ; and the requirements under section 5 will be found set out in Kapur and Pandit's "The Prevention of Corruption Act" (The Criminal Law Series Publications Railway Road, Ambala City), pages 56 to 108; Aggarwalla : "Prevention of Corruption Act", page 85 and following ; Varshini : "The Law Relating to Bribery and Corruption", (Eastern Book Co.), page 95 and following ; Bayes "Commentary on Prevention of Corruption", page 28 and following.

That this appellant-accused was asking for bribe to secure an employment to P.W. 2 it makes no difference whether the public servant was in a position to appoint him or not, *Emperor* v. *Phul Singh*,[1] ; *Mahadeo Dannappa* v. *State*[2] ; *Indur Dayaldas* v. *State of Bombay*[3] ; *Satya Vir* v. *State*[4], the bribe was given is spoken to not only by P.W. 2 but also by the Inspector P.W. 7, the Karnam P.W. 3 and the B. A., B. T. Assistant, P.W. 4. The accused himself does not deny that he was caught with M.Os. 1 to 10 after obtaining (*Ram Krishnan*[5]) the bribe. In fact he wanted to make out that it was the repayment of a loan. Now, in view of section 4 (1) of the Prevention of Corruption Act (Central Act II of 1947) a presumption at once arises that accused accepted the gratification as a motive or reward. The Legislature has by the words 'shall presume' used in section 4 (1) of the Act, made it obligatory on the Court to raise a presumption in every case brought under the Prevention of Corruption Act that the accused received or accepted the money as an illegal gratification unless he rebutted the same. It has been pointed out by their Lordships of the Supreme Court in *State of Madras* v. *Vaidyanatha Iyer*[6], which has been followed by the Kerala High Court in *Sree Krishnanarayana Rao* v. *Republic of India*[7] that for rebutting the presumption under section 4 (1) it is not enough for the accused to offer an explanation which has not been disproved or to create some doubt in the mind of the Court, but that it is necessary for the accused to prove that he did receive the money otherwise than as illegal gratification or bribe, *i.e.*, innocently. Relying on the observations of the Supreme Court in *State of Madras* v. *Vaidyanatha Iyer*[6] and following the observations of Willes, J., in *Copper* v. *Sladet*[8] and of Lord Goddard, C.J. in *R.* v. *Dubbar*[9] the Kerala High Court held, if I may say so with respect, rightly that the burden of proof required to be discharged by the accused in such cases is less than that required at the hands of the prosecution in proving the case beyond reasonable doubt and that the burden may be discharged by the evidence satisfying the Court of probability of that which the accused is called upon to establish, and that where the onus is placed on the accused person it may be discharged by proving what would be enough to support a verdict in his favour in a civil action and that in civil cases the preponderance of probability may constitute sufficient ground for verdict.

The scope and extent of this presumption has been expounded in the following decisions deserving of careful study, *Moolraj* v. *The State*[10] ; *Mehar Singh Hajara Singh* v. *The State*[11] ; *The State* v. *Minaketan Patmali*[12] ; *Mitra* v. *The State*[13] ; *Krishnabi Harilal* v. *The State*[14] ; *Narayan* v. *The State*[15] ; *Lalchand Topindas* v. *State*[16] ; *Ranjit Singh* v. *The State*[17] ; *State* v. *Abhey Singh*[18] ; *Sree Krushna Narayana Rao* v. *Republic of India*[7]; *Akhouri Inder Deo Prasad* v. *State*[19].

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1. A.I.R. 1941 Lah. 276.
2. A.I.R. 1952 Bom. 435.
3. A.I.R. 1952 Bom. 58.
4. A.I.R. 1958 All. 746 at 752 : 229 I.C. 613 : 48 Crl. L.J. 467.
5. A.I.R. 1956 S. 476.
6. (1958) M.L.J (Crl.) 299 : (1958) S.C.J. 335 : (1958) 1 M.L.J. (S.C.) 136 : (1958) 1 An.W.R. (S.C.) 136 : A.I.R. 1958 S.C. 61.
7. (1958) K.L.J. (Crl.) 8 : A.I.R. 1958 Ker. 136.
8. (1858) 6 R.L. Can. 746.
9. (1957) 2 A.E.R. 737.
10. 1955 Crl. L.J. 1585 : A.I.R. 1955 Him. Pra. 51.
11. (1955) Crl. L.J. 1387 : A.I.R. 1955 Pepsu 156.
12. 1952 Crl. L.J. 1393 : A.I.R. 1952 Orissa 267.
13. 52 Crl. L.J. 1116 : A.I.R. 1957 Cal. 524.
14. A.I.R. 1956 Madh. B. 86.
15. A.I.R. 1955 Mad. Bh. 51.
16. A.I.R. 1956 Orissa 201.
17. 1957 Crl. L.J. 42 (All.).
18. 1957 Crl. L.J. 541 : A.I.R. 1957 Raj. 138.
19. A.I.R. 1958 Pat. 374.

If we examine the explanation given by the accused in the light of these observations, it does not amount even to that reduced amount of proof. The test under both English and Indian Law regarding probabilities is that of a prudent man envisaged in section 3 of the Indian Evidence Act. It is found that the story put forward by the accused is a cock-and-bull story. P.W. 2 is a native of Erode. There was no necessity for P.W. 2 to borrow from the accused. The accused was not in flourishing circumstances. His own salary was under attachment. His story that he used to lend out moneys is not supported by any evidence on record. Then, is it credible that this accused would lend to a gambler who had lost the money and did not want his people in the house to know that he had gambled away the money entrusted to him for a family purpose? If really money had been lent like that, would not this accused have taken a promissory note or a bond or a voucher from P.W. 2? The circumstances under which P.W. 2 seems to have called upon the accused as narrated by D.Ws. 1 and 2 impress one that—and the place, time and manner of the alleged repayment—the whole thing is an obvious concoction. In fact in this State of Madras this description of bribe as a loan was a favourite doubt-raising-dodge which I am sorry to say sometimes got put across successfully in our Courts also even when the plea was wholly unfounded until this doubt-raising-trick was exposed and given its death blow by their Lordships of the Supreme Court in *State of Madras* v. *Vaidyanatha Iyer*[1].

The accused has been convicted both for the offences under section 161, Indian Penal Code and under section 5 (1) (*d*) read with section 5 (2) of Act II of 1947. The learned advocate for the accused, Sri V. T. Rangaswami Ayyangar, drew my attention to my decision in In re *Satyanarayanamurty*[2]; in which I have held that the provisions of the Prevention of Corruption Act do not repeal the provisions of the Indian Penal Code and that a person cannot be punished both under the Penal Code and the special law for the same offence. In *Narayanaswami* v. *Kerala State*[3], the Kerala High Court held as follows:

> "Clauses (*a*) to (*d*) of sub-section (1) of section 5 of the Prevention of Corruption Act, specify the different offences which would amount to criminal misconduct by a public servant in the discharge of his official duty and punishable under sub-section (2) of section 5. Every one of the offences specified in clauses (*a*) to (*d*) is an offence made punishable under the Penal Code also. The essential ingredients of the offence under section 5 (1) (*a*) are the same as the ingredients of the offence under section 161, Indian Penal Code, subject to one difference, *viz.*, that offence under section 5 (1) (*a*) is an aggravated form of the offence under section 161, Indian Penal Code. Repetition of the offence under section 161, Indian Penal Code, would amount to the offence of criminal misconduct under section 5 (1) (*a*) of the Prevention of Corruption Act. It follows therefore that the charge framed against the accused that he committed the offence under section 5 (1) (*d*) of the Prevention of Corruption Act necessarily implies that he had committed the offence punishable under section 161, Indian Penal Code. In *Jayarama Iyer* v. *The State of Hyderabad*[4] it was held that section 5 (2) of the Prevention of Corruption Act in fact makes the sentence under sections 161 and 165, Indian Penal Code, more severe and the sentence for an offence under section 5 (1) (*c*) is made less severe by prescribing a punishment extending to seven years or with fine or with both. See also *Mahfus Ali* v. *The State*[5], *Bhup Narain* v. *State*[6], *Om Prakash* v. *The State*[7]."

Section 26 of the General Clauses Act envisages the possibility of the same act or omission not only being an offence under different enactments but of the accused being charged under either or any of them, though he shall not be punished twice for the same offence. In *Lohana Kantilal* v. *State*[8] it was held that separate sentences for the conviction under section 161, Indian Penal Code and section 5 (2) of the Prevention of Corruption Act are illegal since there is only one act which constitutes an offence under two enactments. Therefore, the sentence under section 161, Indian Penal Code, imposed on this accused has to be formally set aside. In this case as a matter of fact the sentences awarded under section 161, Indian Penal Code,

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1. (1958) 1 M.L.J. (S.C.) 136 : (1958) M.L.J. (Crl.) 299: (1958) 1 An.W.R. (S.C.) 136: (1958) S.C.J. 335 : (1958) S.C.R. 580 : A.I.R. 1958 S.C. 61.
2. (1952) 2 M.L.J. 777 : 1953 Crl. L.J. 309 : 65 L.W. 1120 : A.I.R. 1953 Mad. 137.
3. (1957) M.L.J. (Crl.) 443 : 1957 Ker. L.J. 476.
4. A.I.R. 1954 Hyd. 56.
5. A.I.R. 1953 All. 110.
6. A.I.R. 1952 All. 35.
7. 1955 Crl. L.J. 754: A.I.R. 1955 All. 275.
8. A.I.R. 1954 Sau. 121.

and under section 5 (2) of the Prevention of Corruption Act have been made to run concurrently. But the requirements of the law can be fully complied with only if the sentence imposed under section 161, Indian Penal Code, is formally set aside and it is hereby set aside.

The convictions of the accused by the learned Special Judge under section 161, Indian Penal Code and section 5 (2) of the Prevention of Corruption Act are correct and they are confirmed.

In regard to the sentence, where the learned Special Judge has given adequate reasons for giving a sentence of one year's imprisonment, I do not think it proper that I should interfere with it for no reason. The sentence of imprisonment imposed under section 5 (2) of the Prevention of Corruption Act is also confirmed.

I would like, however, to point out that in this case where the accused is almost on the verge of retirement and had put in a long period of service, the authorities might consider whether there should be a complete forfeiture of his full gratuity and bonus, amounting to a large sum, thereby cause vicarious suffering to his dependents. This is a matter entirely for the powers-that-be to consider and not for this Court, which can do nothing more than merely drawing attention.

The model investigation of this case by Sri A. Devasahayam, Inspector of Police, Special Police Establishment, is specially commended.

K.S. ——— *Appeal dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Subramaniya Pillai .. *Appellant**

v.

Dhanabagyathammal and another .. *Respondents.*

Hindu Law—Family arrangement—Nature and scope of—Family arrangement entered into by limited owner—Effect on reversioners.

A family arrangement stands on a similar footing as a compromise. It is an arrangement come to between relations or members of a family who have their own unadmitted rights to be pressed against one another in order to avoid litigation and for the benefit of peace, security or preservation of the property in dispute and to such an arrangement great importance is attached by Courts. This principle is applicable where some of the members of the family are minors or where the settlement has been effected by a qualified owner whose act in this respect will bind the reversioners. *Bona fides* is the essence of its validity. This family arrangement entered into by a widow or other limited heirs binds the reversioners though they may not be parties thereto.

Appeal against the Decree of the District Court of Tiruchirapalli in Appeal Suit No. 216 of 1953 preferred against the Decree of the Court of the Subordinate Judge of Tiruchirapalli, in Original Suit No. 29 of 1951.

M. R. Narayanaswami, for Appellant.

V. Ratnam (*amicus curiae*), for Respondents.

The Court delivered the following

JUDGMENT.—This is a second appeal preferred against the decree and judgment of the learned District Judge of Tiruchirapalli in A.S. No. 216 of 1953, confirming the decree and judgment of the learned Subordinate Judge of Tiruchirapalli in O.S. No. 29 of 1951.

The suit property originally belonged to Parimana Pillai who died in 1916 according to P.W. 1, or about 1923, surviving him his wife Kamakshi who died between 1943 and 1946 and three daughters, Pappathi and Sornathammal, who are alive, and Meenammal who died in July-August, 1948. The first defendant Dhanabagyam is the daughter of that Meenammal in whose favour Meenammal has

* S.A. No. 1096 of 1955. 7th October, 1958. (15th Asvina, 1880-Saka.)

bequeathed the suit property. The plaintiff is the son of Pappathi, examined as P.W. 2 in this case. The other daughter Sornathammal is married to Vythilingam (D.W. 2) and has no issue.

Exhibit B-2 is the sale-deed, dated 29th September, 1937, by which Kamakshi Ammal transferred the suit property, a house, to her daughter Meenammal. The evidence on the defendants' side through D.W. 2 is that some days prior to the execution of this sale-deed the two sisters Pappathi and Sornathammal raised a dispute as to how it was that one sister alone Meenammal was in enjoyment of the house, when all of them should have been in enjoyment equally. It appears from the evidence that Meenammal had been living with her mother, whereas her other two sisters were staying with their husbands in different places where they were working as public servants. Therefore, there was a Panchayat. In that Panchayat an amicable arrangement was arrived at. It was agreed that the property should be sold by Kamakshi to Meenammal for Rs. 300 of which Rs. 100 was to be taken by Kamakshi Ammal for the discharge of her debts and Rs. 100 was to be paid to each of her other daughters Pappathi and Sornathammal. The evidence of D.W. 2 is that there was a Varthamanam letter drawn up and that receipts were also passed to Meenammal for payments made to her two sisters, though the Varthamanam and receipts are not forthcoming and for which an explanation is given on the defendant's side. This family arrangement cannot be disputed. There is a reference in Exhibit B-2 to an earlier agreement of 1937 by which the two sisters of Meenammal were to be paid Rs. 100 each and Kamakshi Ammal the remaining Rs. 100 for the discharge of her sundry debts. That this Exhibit B-2 which came into existence under this family arrangement is an operative document given effect to by all the parties thereto is evident from the fact that from 1937 to 1948 there was no interference with Meenammal's possession. Tax receipts and demand notices from the Municipal office have been produced, some in the name of Kamakshi Ammal, the mother, and some in Meenammal's name. There is the evidence of D.W. 7 that his father, the second defendant, took a lease of the property. Exhibit B-7 is the rent deed executed in favour of the first defendant, the daughter of Meenammal, in 1948. The evidence of D.W. 7 shows that even prior to 1948 during the lifetime of Meenammal, his father was a tenant under her and that with the permission of the landlady he had electrified the house at a cost of Rs. 510. In Exhibit B-7 provision is made for the adjustment of the electric charges against the rent. There is evidence also on the plaintiff's side that for some time Menammal had leased the property to a Chettiar immediately after the death of Kamakshi Ammal. It is also established by the evidence on record that improvements were effected to the house by Meenammal and by no one else. The house which was tiled was got terraced by her. These are concurrent findings of fact, which were unassailable before me. Therefore, these facts may be taken as safely established.

Before the death of Meenammal, she executed a will bequeathing the suit property to her daughter, the first defendant. The will is Exhibit B-3, dated 4th July, 1948. Meenammal died in July-August, 1948. On the death of Meenammal, her sisters who had parted with their interests in the suit property under the family arrangement spoken to above, started laying claim to the suit property and raised a dispute with the first defendant. On account of Exhibit B-2 staring on their face, they resorted to the device of executing a so-called surrender deed Exhibit A-3, dated 27th October, 1948, in favour of the son of Pappathi, *viz.*, the plaintiff. The plaintiff then started giving trouble to the first defendant and filed the suit, out of which this second appeal arises, for a declaration that the suit property belonged to him and for recovery of possession of the same.

The learned Subordinate Judge, Mr. M. V. Harihara Ayyar, held that the property was purchased by Kamakshi Ammal with her funds in the name of her husband Parimana Pillai, that the family arrangement is true and valid and binding on Pappathi and Swarnammal, that the sale-deed of 1937 by Kamakshi Ammal to Meenammal is valid and binding on the plaintiff, that the surrender deed is not

valid and the plaintiff is estopped from questioning the sale-deed, dated 29th September, 1937, by Kamakshi and Meenammal. Therefore, he dismissed the suit with costs.

There was an appeal which was disposed by the learned District Judge, Mr. J. H. Barboza, and he posed for himself four points for determination and came to the conclusion that Kamakshi Ammal was not the real owner of the suit property, that the family arrangement is true and that the plaintiff is not estopped from claiming the suit property which arose from the allegations that he acted as a Maistry under Meenammal in converting the tiled house into a terraced house and secondly, that he had knowledge of the will by Meenammal in her daughter's favour and attested it, and that the surrender of the property by Pappathi and Sornathammal did not affect the right of the first defendant to continue in possession until the death of both Pappathi and Sornathammal and that the plaintiff must have to await the death of both of them before he could claim the suit property. This was based upon the *ex cathedra* pronouncement by the learned District Judge in the beginning of paragraph 13 of his judgment which he does not condescend to discuss :

"Of course, the family arrangement will not be binding on the plaintiff after the reversion has opened".

It is apparently on the foot of this *ex cathedra* pronouncement that the final conclusion just now set out seems to have emerged (point No. 4). In the result the learned District Judge confirmed the decree and judgment of the learned Subordinate Judge and dismissed the appeal. Hence this second appeal by the defeated plaintiff.

In this second appeal it is unnecessary for me, in view of my conclusion on the family arrangement, to discuss whether Kamakshi Ammal was the real owner of the suit property. I am prepared to assume for the disposal of this second appeal that she was a limited owner.

Having come to this conclusion, it is found that this limited owner has entered into a family arrangement as a result of which Exhibit B-2 has come into existence and has been acted upon by all the parties relating thereto.

The law relating to a family arrangement by a widow is well settled. A family arrangement stands on a similar footing as a compromise. It is an arrangement come to between relations or members of a family, who have their own unadmitted rights to be pressed against one another, in order to avoid litigation and for the benefit, peace, security or preservation of the property in dispute, and to such an arrangement great importance is attached by the Courts : *Sidh Gopal* v. *Bihari Lal*[1], *Binda Kuer* v. *Lalita*[2] ; *Mst. Hardei* v. *Bhagwan*[3] ; *Bishambarnath* v. *Amarnath*[4]. In the absence of proof of mistake, inequality of position, undue influence, coercion, or like ground, a family arrangement made in settlement of the disputed or doubtful claim is a valid and binding arrangement which the parties thereto cannot deny, ignore or resile from ; and this principle is applicable where some of the members of the family are minors, or where the settlement has been effected by a qualified owner whose act in this respect will bind the reversioners : *Dangal Ram* v. *Jainmangal*[5]. *Bona fides* is the essence of its validity. There must be either a dispute, or at least an apprehension of a dispute, a situation of contest which is avoided by a policy of giving and taking, or else all transfers and surrenders will pass under a cloak of family arrangement : *Basantakumar Basu* v. *Ramshankar*[6], *Joges Chandra* v. *Prasanna Kumar*[7] ; *Ramayya* v. *Lakshmayya*[8]. There can be no basis for a family settlement conferring title on a person binding on the reversion if it is not shown that he had some competing title of his own in respect of the disputed property. But it is not essential to the validity of a family settlement that there must be disputes

1. (1927) I.L.R. 50 All. 285.
2. 44 M.L.W. 546 : A.I.R. 1936 P.C. 304.
3. (1919) 13 L.W. 436 : A.I.R. 1919 P.C. 27.
4. (1937) 41 C.W.N. 651 : A.I.R. 1937 P.C. 105 (P.C.).
5. A.I.R. 1926 Pat. 364.
6. (1931) 55 C.L.J. 205.
7. A.I.R. 1932 Cal. 664.
8. (1942) 2 M.L.J. 249.

existing at the time the settlement is arrived at. The members of the family may anticipate disputes likely to arise thereafter, and in order to prevent them and with a view to maintain amity and peace in the family, they may arrive at a settlement among themselves which can be held to be valid : *Bajrang* v. *Rameshar*[1] ; *Jung Bahadur* v. *Rana Uma*[2]. This family arrangement entered into by a widow or other limited heir binds the reversioners, though they may not be parties thereto· *Khunni Lal* v. *Gobind Krishna*[3] ; *Hiran Bibi* v. *Sohan Bibi*[4] ; *Upendra Nath* v. *Bindesri Prosad*[5], *Bihari Lal* v. *Daud Husan*[6]. In the following cases it was held that the compromise did not bind the actual reversioners : *Himmat Bahadur* v. *Dhanpat Rai*[7]; (no *bona fide* dispute and no *bona fide* settlement) *Janak Kishori* v. *Babu Debi Prasad*[8]; (compromise by a widow of her claim as a legatee under her husband's will *Anup Narayan* v. *Mahabir Prasad*[9] (compromise not for the benefit of the estate) *Narayan Singh* v. *Rajkumar*[10] (compromise not for the benefit of the estate) *Musammat Bhagwati* v. *Jagadam*[11] ; (no doubtful claim): (*See* N. R. Raghavachari, "Hindu Law" M.L.J., third edition, page 566 ; Mulla, "Principles of Hindu Law" eleventh edition, pages 209-214 ; Mayne on "Hindu Law and Usage," Eleventh Edition, page 880 and following; S. V. Gupta, "Hindu Law" second edition, page 637 and following).

Bearing these principles in mind, if we examine the facts of this case, both the Courts having found that the family arrangement was true and acted upon by all the parties relating thereto, this would certainly be binding upon the next reversioner, the plaintiff, though he was not a party thereto. I am unable to understand the *ex cathedra* pronouncement of the learned District Judge referred to above, and which he has not condescended to discuss and which appalling ignorance of Hindu Law would have been dissipated if he had merely taken the trouble of consulting the standard treatises on Hindu Law set out above.

I take it that what the learned District Judge meant was that in any event the parties to the family arrangement being estopped from disputing it, the suit was premature. But even if this was his assumption, he should have examined the further question whether when the next reversioners who could question the alienation by the mother Kamakshi Ammal were alive, the remoter reversioner could do so on the foot that Kamakshi Ammal and her daughters had colluded in order to defraud the remoter reversioner. That he could do and this is the case here. In fact the finding of the learned Subordinate Judge that Exhibit B-2 is valid and binding on the plaintiff has not been set aside by the learned District Judge. Therefore, the wholly supererogatory and mischievous observations of the learned District Judge about the plaintiff's possibility of claiming the suit property after the death of Pappathi and Sornathammal should be eschewed and his affirmation of dismissal of the suit by the learned Subordinate Judge should be confirmed and this second appeal wholly devoid of merits should be dismissed without costs. Ordered accordingly.

I thank Mr. V. Ratnam, who appeared as *amicus curiae* at my instance, for the respondent and argued the matter.

No leave.

V.S. *Appeal dismissed.*

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1. (1936) 12 Luck. 684.
2. (1936) 12 Luck. 639.
3. (1911) 21 M.L.J. 645 : L.R. 38 I.A. 87 : I.L.R. 33 All. 356 (P.C.).
4. 18 C.W.N. 929 : A.I.R. 1914 P.C. 44.
5. (1915) 20 C.W.N. 210.
6. (1913) I.L.R. 35 All. 240.
7. (1916) I.L.R. 38 All. 335.
8. (1916) 39 I.C. 750.
9. (1916) 42 I.C. 95.
10. (1922) I.L.R. 44 All. 428.
11. (1922) 67 I.C. 597.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

Valliammal Ammal .. *Appellant**

v.

Periasami Udayar .. *Respondent.*

Hindu Marriage Act (XXV of 1955), *sections* 3 (*b*), 9 *to* 13 *and* 28—*Orders on petitions under the Act —Forum of Appeal.*

Both under the provisions of section 28 of the Hindu Marriage Act as well as the general principles of law an appeal would lie against a decree under sections 9 to 13 of the Hindu Marriage Act to that Court to which appeals generally lie from a decree or order of the Court to which jurisdiction is granted. If a Subordinate Judge were given jurisdiction under the Act an appeal from his decision would under section 13 of the Madras Civil Courts Act lie only to the District Judge. The forum will be the same even if the petition under the Act had been instituted in the District Court after the date of notification under section 3 (*b*) of the Act and transferred by that Court for disposal to the Sub-Court.

If by virtue of a notification under section 3 (*b*) of the Act a Court other than the District Court is given jurisdiction under the Act it is only an extensoin of jurisdiction of that Court and appeals under section 28 of the Act would lie only to that Court to which appeals generally lie from the decisions of that Court.

If on the date on which the petition was presented to the District Court the Sub-Court had no jurisdiction, an appeal would lie only to the High Court. Such a right to appeal would be a vested one.

As the decision in matrimonial disputes under sections 9 to 13 of the Act should be deemed to be a decree a further appeal would lie from the decision of the District Judge on appeal.

Where a petition under the Act was filed before the notification an appeal would lie directly to the High Court. If an appeal in such a case is filed before the District Judge and disposed of by him, on the question of jurisdiction a Second Appeal would lie to the High Court.

National Telephone Co. v. *The Post-master General,* L.R. 1913 A.C. 546 and *Colonial Sugar Refining Co.* v. *Irving,* L.R. (1905) A.C. 309, referred.

Appeal against the Order, dated 11th March, 1958, in A.S. No. 272 of 1957 on the file of the District Court, South Arcot, at Cuddalore (O.P. No. 25 of 1957, Subordinate Judge's Court, Cuddalore).

G. R. Jagadisan, K. K. Sreedharan and *K. S. Naidu,* for Appellant.

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* S.R. Nos. 27783, 37109 and 14179 of 1958. 3rd March, 1959.
(14th Palgauna 1880—Saka)

The Court made the following

ORDER.—These matters have been referred by the office* for directions as to the maintainability of the above appeals. S.R. No. 37109 is an appeal against an order for judicial separation under section 10 (1) of the Hindu Marriage Act of 1955. The petition for judicial separation was filed by the husband on 10th September, 1957, in Sub-Court, Tanjore. S.R. No. 14179 is an appeal against an order dismissing an application for divorce. That petition was filed by the husband who is the appellant on 17th December, 1956, in the District Court of Tiruchirappalli. The petition was

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* **Office Note.**—A.E. 8/59 S.R. Nos. 27783, 37109, 14179 and 158. The question that arises for determination in these three cases is whether the forum for appeal under section 28 read with section 19 of the Hindu Marriage Act (Central Act XXV of 1955) against the decision of a Subordinate Judge is the High Court or the District Court in view of the powers vested in the Subordinate Courts under G.O.Ms. No. 221 (Home) dated 29th January, 1957, to exercise jurisdiction in respect of matter arising under the Act.

According to section 19 of the Act it is the District Court that can hear the original proceedings arising under the Act.

The expression "District Court" has been defined in section 3 (*b*) of the Act. Under the rule-making powers vested in the State Government under the aforesaid provision, the Government has issued G.O. Ms. No. 221 (Home) dated 29th January, 1957, empowering the Subordinate Judge to hear proceedings arising under the Act within his respective jurisdiction.

The above definition would appear to imply that even though an order is passed by a Subordinate Judge under the enabling provision contained in the Government Order aforesaid, he must be deemed to have exercised the powers of a District Judge under section 19 of the Act. In such a case an appeal under section 28 would appear to be competent against the order of the Subordinate Judge in the High Court and not in the District Court.

But there appears to be no uniformity in the principle followed by the Subodinate Courts in respect of the entertaining of the appellate proceedings arising under the Act, because in some cases, appeals are permitted to be laid in the District Court under section 28 of the Act against the decisions of the Subordinate Judges, while in others the appeals are directly preferred to the High Court under the same provision of the enactment.

There is nothing in the Act that would warrant the filing of a Second Appeal when once an appeal has been heard and finally disposed of by the District Judge under section 28 of the Act. The present S.R. No. 27783 filed herein as C.M.S.A. in the High Court is purported to be under section 21 of the Act, while S. R. Nos. 37109 and 14179 are also sought to be presented in the High Court as Civil Miscellaneous (First) Appeals under section 28 of the Act. On account of there being no uniform practice followed with regard to the proper forum to be adopted for the appeal under section 28 of the Act in these cases, complications are bound to set in at subsequent stages, if under the same provision in the enactment both C.M.As. and C.M.S.As. are permitted to be filed in the High Court. When an aggrieved party who has chosen the High Court as the forum for his appeal under the Act, against the order of the Subordinate Judge, he is entitled to take the matter, on further appeal under Clause 15 of the Letters Patent; but the same privilege cannot be extended to an aggrieved party, who under similar circumstances has chosen the District Court as the forum for his appeal and against the appellate order of the District Court he desires to take it on a further appeal to the High Court under the same provision as a C.M.S.A. This is because, in the latter case, an appeal under Clause 15 of the Letters Patent will not be competent, unless the party has applied for and obtained a certificate at the time of delivery of judgment in the C.M.S.A. under Rule 95 of the Rules of the High Court Appellate Side.

Hence the present note is submitted for an authoritative pronouncement on the subject as to what the proper forum for appeal is under section 28 of the Hindu Marriage Act, *viz.*, whether it is the High Court or the District Court. It may perhaps be necessary to refer to the relevant provisions of the Act which are briefly set out below :

Section 21 of the Hindu Marriage Act provides that subject to the other provisions contained in the Act and to such rules as the High Court may make in this behalf, all proceedings under the Act shall be regulated, as far as may be, by the Code of Civil Procedure, 1908 (Act V of 1908).

No rules appear to have been framed in the High Court under section 21 of the Act.

Section 28 of the Act provides that all the decrees and orders made by the Courts in any proceedings under this Act shall be enforced in like manner as the decrees and orders of the Court made in the exercise of its Original Civil Jurisdiction are enforced and may be appealed from under any law for the time being in force, provided that there shall be no appeal on the subject of costs only.

Section 19 of the Act provides that every petition under the Act shall be presented to the District Court within the local limits of whose Ordinary Original Civil Jurisdiction the marriage was solmenized or the husband and the wife reside or last resided together.

It is clear from the above sections, that the forum for presenting the original petition under the Act is the District Court.

later transferred by the District Judge to Subordinate Judge, Tiruchirapalli, who passed an order dismissing the petition. S.R. No. 27783 is a C.M.S.A. against an order of the District Judge of South Arcot at Cuddalore reversing the order of the Sub-Court and granting a decree for restitution of conjugal rights. The application was filed in the year 1956 originally in the District Court. It was later transferred for disposal to the Subordinate Judge. The Subordinate Judge dismissed the application. On an appeal filed to the District Court by the husband an order for restitution of conjugal rights was passed. A C.M.S.A. is sought to be preferred to this Court against the order.

These references raise a question as to whether an appeal against an order passed by the Subordinate Judge under section 10, 13 or 9 of the Hindu Marriage Act, 1955, would lie to the appropriate District Court or to the High Court direct. Prior to the passing of the Central Act XXV of 1955 there was a legislation in this State in respect of certain matrimonial disputes amongst Hindus. The Madras Hindu Bigamy Prevention and Divorce Act of 1949 declared all bigamous marriages by a Hindu void and punishable. It also provided for dissolution of certain marriages. Jurisdiction under that Act was given to the Subordinate Judge, District Judges and City Civil Judges within the limits of whose jurisdiction the marriage was solemnised or the respondent resided. Against any order passed on the petition by anyone of the aforesaid Judges an appeal was declared to lie directly to the High Court.

The Hindu Marriage Act, 1955, Act XXV of 1955, was passed to codify the Hindu law of marriage. By so doing it has effected important changes in the marriage law. It granted rights of divorce, judicial separation and permanent alimony. It is unnecessary for the present purpose to refer to the other changes introduced by the Act in regard to the Hindu Law relating to marriages. The Act also provided for remedy in respect of the new rights created by it. The Act dealt with the pre-existing right of either of the spouses to sue in a civil Court for restitution of conjugal rights. Section 9 provided for restitution of conjugal rights ; section 10 for judicial separation, sections 11 and 12 related to void and voidable marriages and section 13 related to divorce.

Section 19 prescribed the Court to which a petition under the Act should be made. It runs as follows :

> "Every petition under the Act shall be presented to the District Court within the local limits of whose ordinary Original Civil Jurisdiction the marriage was solemnised or the husband and wife reside or last resided together."

The term 'District Court' has been defined in section 3 (*b*) of the Act as meaning :

The term "District Court" has been defined in section 3 (*b*) of the Act as meaning in any area for which there is a City Civil Court, that Court, and in any other area the Principal Civil Court of Original Civil Jurisdiction and includes any other Civil Courts which may be specified by the State Government by Notification in the Official Gazette as having jurisdiction in respect of matters dealt with in the Act.

The State Government in exercise of the powers conferred by the aforesaid section 3 (*b*) of the Act has notified in G.O.Ms. No. 221 (Home), dated 29th January, 1957, that the Subordinate Judges' Courts in the State shall have jurisdiction in respect of matters dealt with under the Act and arising in their respective jurisdiction.

A reading of the above provisions of the enactments would seem to imply that though an order is passed by a Subordinate Judge in the exercise of his functions under section 3 (*b*) of the Act, it must be deemed to have been passed only by the District Court and in such a case an appeal cannot lie to the District Court against the decision of the Subordinate Judge because the proper forum would in such a case be only the High Court and not the District Court.

In the circumstances mentioned above, it is for consideration and orders as to what the proper forum for appeal is under section 28 of the Act, and whether the above S.R. Nos. 37109 and 14179 of 1958 filed as Civil Miscellaneous Appeals are in order ; and if so whether S.R. No. 27783 filed as a C.M.S.A. should be held to be not competent though there appears to be no objection for a Civil Revision Petition being entertained when an appeal under section 28 of the Act had been heard and decided already by the District Judge and a further appeal to the High Court is considered as not maintainable.

"In any area for which there is a City Civil Court, that Court, and in any other area the Principal Civil Court of Original Civil Jurisdiction and includes any other Civil Courts which may be specified by the State Government by notification in the Official Gazette as having jurisdiction in respect of matters dealt in this Act".

Under the authority conferred by this Act the State Government has issued G.O. 221, Home, dated 29th January, 1957, empowering the Subordinate Judges of the various places to hear proceedings arising under the Act within their respective jurisdiction. Section 28 of the Act deals with the execution of orders passed by the Court and also provides for a right of appeal. That states :

"All decrees and orders made by the Court in any proceedings under this Act shall be enforced in like manner as the decrees and orders of the Court made in the exercise of its original civil jurisdiction are enforced and may be appealed from under any law for the time being in force; provided that there shall be no appeal on the subject of costs only".

On a reading of section 19, it is clear that the jurisdiction under the Act is given to an existing civil Court. It is no doubt true that rights unknown previously to the Hindu Law are created by the Act. But the remedy in respect of those rights which are civil rights are given to the existing Courts and should therefore be deemed to be an extension of their jurisdiction. Section 21 provides for the application of the rules of civil procedure in the absence of any special rules being made by the High Court for the conduct of the trial of petitions under the Act. Section 28 which I have set out above also emphasises this aspect.

Section 28 while it gives a right of appeal to the aggrieved spouse does not prescribe the forum. It simply says that appeals would lie as if they were decrees or orders of the Court. Section 28 recognised the well-established principle in regard to procedure when a new jurisdiction was given to an existing Court. The rule has been stated by Viscount Haldane, Lord Chancellor, in *National Telephone Co.* v. *The Post-Master General*[1] thus :

"When a question is stated to be referred to an established Court, it, in my opinion, imports that ordinary incidents of the procedure of that Court are to attach and also that any general right of appeal from its decision likewise attaches."

In *Secretary of State for India* v. *Chellakanni Rama Rao*[2] jurisdiction to decide certain disputes under the Forests Act was given to the District Judge. There was no provision under the Madras Forests Act for an appeal. The question arose whether an appeal would lie against an order by the District Judge under that Act. At page 624, Lord Shaw observed :

"When proceedings of this character reach the District Court that Court is appealed to as one of the ordinary Courts of the country with regard to whose procedure, orders and decrees the ordinary rules of civil procedure can be applied."

To the same effect is the judgment of the Privy Council in *Adaikappa Chettiar* v. *Chandrasekhara Thevar*[3], where their Lordships held that where a legal right was in dispute and the ordinary Courts of the country were seized of such dispute the Courts were governed by the ordinary rules of procedure applicable thereto and an appeal could lie if authorised by such rules notwithstanding that the legal right claimed arises under a special statute which did not in turn confer a right of appeal.

Under the Hindu Marriage Act the Statute does give a right of appeal, but it does not prescribe the forum to which such appeals would lie. A question would also arise whether there would be only one appeal, or there would be a right of further appeal from a decree or order of the appellate Court. These questions would, in my opinion, be governed by the principle of the cases referred to above, that is the procedure of the Court, to which that jurisdiction under the Act is given, would apply in regard to the appeals. It follows that both under the provisions of section 28 of the Act, as well as the general principles of law an appeal would lie against a decree in a matrimonial cause to that Court, to which appeals generally lie from a decree or order of the Court to which jurisdiction is granted. Section 13 of the Madras Civil Courts Act states :

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1. L.R. (1913) A.C. 546.
2. (1916) I.L.R. 39 Mad. 617: L.R. 43 I.A. 192: 31 M.L.J. 324 (P.C.).
3. I.L.R. (1948) Mad. 505 : (1948) 1 M.L.J. 41 : L.R. 74 I.A. 264.

"Regular or special appeals shall when such appeals are allowed by law, lie from the decrees and orders of the District Court to the High Court. Appeals from the decrees and orders of Subordinate Judges and District Munsifs shall, when such appeals are allowed by law, lie to the District Court, except when the amount or value of the subject-matter of the suit exceeds Rs. 10,000 in which case the appeals shall lie to the High Court".

It is unnecessary for the present purpose to refer to the three provisos to the section. In regard to a matrimonial dispute, it cannot be stated that the subject-matter of the dispute exceeds Rs. 10,000. That is a matter which is not capable of valuation. It would, therefore, appear that if a Subordinate Judge were given jurisdiction under the Act, an appeal from his decision would, under section 13 of the Madras Civil Courts Act, lie only to the District Judge. As the decision in the matrimonial disputes under section 9, 10, 11, 12 or 13 of the Hindu Marriage Act should be deemed to be a decree, a further appeal would lie from the decision of the District Judge on appeal.

It is, however, contended for the appellant in the first two of the above cases that an appeal from the Suboridnate Judge would only lie to the High Court, and not to the District Court. The argument is that a Subordinate Judge who obtains jurisdiction by virtue of the notification made by the State Government under section 3 (*b*) of the Act should be deemed to be a District Court for the purpose of exercising the jurisdiction under the Act, and being deemed to be a District Court it is contended that an appeal from any order or decree of that Court should necessarily lie only to the High Court, and not to any subordinate authority. I cannot, however, agree with this contention.

Under the Act jurisdiction in regard to the adjudication of matrimonial disputes is given to a particular class of civil Courts. These have been compendiously described in the Act as a District Court: *vide* section 3 (*b*). The definition, of a District Court under section 3 (*b*) does not mean that a Court which is notified by the State Government becomes a District Court. What the section provides is that ordinarily it is the City Civil Court or the District Court that would have jurisdiction to adjudicate disputes under the Act. But power is given to the State Government to designate by notification other Courts as well. By virtue of the notification other Courts will have jurisdiction as such Courts and not as a District Court, and it cannot be held that for the purpose of the Act, Courts other than the District Court would by virtue of the notification become a District Court. It would, therefore, follow that if by virtue of the notification under section 3 (*b*) a Court other than the District Court is given jurisdiction under the Act it is only an extension of jurisdiction of that Court and appeals under section 28 of the Act would lie only to that forum to which appeals generally lie from the decree and orders of that Court.

In *Venkatarama Iyer* v. *Srinivasa Sastrigal*[1], a question arose as to what was the proper forum of appeal in regard to an application under rules 7 and 9 made under the Madras Agriculturists Relief Act. Rule 9 simply provided that an order declaring the amount of debt due under rule 7 would be subject to appeal and second appeal as if it were a decree in an original suit. The learned Judges held that the rule attracted the procedure relating to appeals including the provisions governing the appellate jurisdiction of the Courts which were essentially a matter of procedure. It, therefore, held that section 13 of the Madras Civil Courts Act would apply and the forum of appeal would be determined in accordance with it. In *Prabhakar* v. *Usha Prabhaker*[2], a question arose as to the proper forum of an appeal in a case under the Bombay Hindu Divorce Act, 1947. Originally under section 5 of the Act jurisdiction was given only to the District Judge. Later by an amendment the District Courts were enabled to transfer the matrimonial disputes to an Assistant or a Civil Judge in the District. In that case a suit under the Act was instituted prior to the amendment. But after the amendment the matter was transferred to the Civil Judge and he passed a decree for divorce. The learned Judges held that by virtue of the provisions of section 5-A the suit transferred to the Court of the Civil Judge should be regarded as a suit orginally instituted in the Court for the purpose of exercising powers and jurisdiction in respect of trial of the suit and that an appeal from that Court would lie

1. (1943) 2 M.L.J. 352. 2. I.L.R. (1953) Bom. 323.

only to the District Judge, notwithstanding the fact that the suit was originally filed in the District Court and later transferred to the Civil Judge. An exeception, however, was made to this rule in regard to a suit which was instituted before the coming into force of the amended section giving jurisdiction to the Civil Judge. In such a case it was held that the appeal would lie directly to the High Court. I am of opinion that the principle of the decision in that case would apply to the present one.

The notification of the State Government investing jurisdiction in the Sub-Courts in regard to cases arising under the Hindu Marriage Act was made on 29th January, 1957. The decree or order of the Sub-Court in regard to petition instituted thereafter being given in the exercise of its own jurisdiction section 13 of the Civil Courts Act would apply to the case and an appeal would lie only to the appropriate District Court. I have already indicated that on such matters there is no question of valuation. So appeals from decrees in respect of petitions instituted in the Sub-Court after 29th January, 1957, would lie only to the District Court. The forum will be the same even if the petition had been instituted in the District Court after that date and transferred by that Court for disposal to the Sub-Court.

S. R. No. 37109 would, therefore, be returned to the appellant for being presented to the proper District Court.

S. R. No. 14179 was filed on 17th December, 1956, in the District Court and after the notification, was transferred to the Sub-Court for disposal. An appeal is sought to be filed directly to this Court against the decree of the lower Court. It is now well settled that a right of appeal to a superior Tribunal is a vested right in a litigant and such a right could not be taken away except by statute either expressly or by necessary implication taking away such a right. In the instant case on the date on which the petition was presented to the District Court, the Sub-Court had no jurisdiction. An appeal would, therefore, lie to the High Court in respect of proceedings intitiated before the notification. Such a right of appeal would be a vested one. In *Colonial Sugar Refining Co.* v. *Irving*[1], an application was made to the Privy Council to dismiss an appeal from the judgment of the Supreme Court of Queensland on the ground that the power of the Court to give leave to appeal had been abrogated by an Act. The action in respect of which the appeal was brought was commenced prior to the passing of that enactment, though leave to appeal was given subsequently. Lord Macnaghten observed at page 372,

"As regards the general principles applicable to the case there was no controversy. On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellant would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment. And therefore the only question is, was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure."

The Privy Council, therefore, dismissed the Application holding that the leave was properly granted.

In the instant case, the appellant had a right on the date of the notification by the Government to file an appeal to the High Court. That right could only be taken away by a provision in the statute. There is no such provision in the Hindu Marriage Act. The effect of section 3 (*b*) is only to empower the State Government to invest certain Courts with jurisdiction under the Act. Such a notification canot mean that the right of appeal to a particular Court which inhered in a party prior to its coming into force has been either expressly or impliedly taken away. Indeed the State Government would appear to have no such power as the only power given to them under section 3 (*b*) is to prescribe a Court and not to modify other provisions of the

1. L.R. (1905) A.C. 369.

Act. On this principle S.R. No. 14179 should be held to be properly filed in this Court and the appeal will be numbered.

S.R. No. 27783.—In this case the petition was filed before the notification was made by the Government on 29th January, 1957. The pettioner would, therefore, have a right of appeal to the High Court on the date when the application was filed. During the pendency of the petition in the District Court, the State Government made the notification referred to already and as a result thereof the District Judge transferred the petition to the Sub-Court. The Subordinate Judge dismissed the application. On the principles set out above an appeal would lie from the decision of the Subordinate Judge only to this Court. The petitioner filed an appeal in a Court which had no jurisdiction and that Court purporting to act under an appellate jurisdiction set aside the order of the Sub-Court. The respondent to the application has filed the appeal as the lower appellate Court had no jurisdiction. The proper way of correcting that error is by second appeal to this Court. The District Judge purported to act as appellate Court and the question whether he had jurisdiction so to act is a matter in respect of which a second appeal would lie. It, therefore, follows that S.R. No. 27783 has been properly filed as a C.M.S.A. It would be admitted and numbered.

V.S. ——— *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE BALAKRISHNA AYYAR.

AV.R.A. Veerappa Chettiar .. *Applicant**

v.

The Commissioner of Income-Tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), section 9 (1) and Ceylon Municipal Council Ordinance—' Annual charge'—What constitutes—Property rates paid in Ceylon—Whether a permissible deduction in computing the income from such properties.

The word 'charge' in the statutory expression ' annual charge ' in section 9 (1) (*iv*) of the Income-tax Act connotes something more than a mere liability to pay something more than an annual payment. Both the concepts involve a liability to pay and a charge on the house property for the discharge of that liability. That charge can be contractual or statutory. It can be expressed or implied.

The owner of a house in Ceylon assessed to municipal rates under the provisions of Ceylon Municipal Council Ordinance is under a legal liability to pay those rates which are annual. But there is no provision in the law of Ceylon analogous to section 103 of the Madras City Municipal Act which makes the tax a first charge on the house property and makes the house, security for the payment of the house-tax. There is nothing in the Ceylon law even to indicate that the income from the house property is a source from which the assessed rates have to be paid.

The assessee is not entitled to claim the payment towards the Ceylon municipal rates as lawful deductions permitted by section 9 (1) since the rates do not constitute an annual charge within the meaning of section 9 (1) (*iv*) of the Act.

New Piecegoods Bazaar, Co., Ltd. v. *Commissioner of Income-tax, Bombay,* (1950) S.C.J. 437 : (1950) 18 I.T.R. 516 (S.C.), referred.

Commissioner of Income-tax v. *State Bank of India,* (1957) 31 I.T.R. 545, differed.

Case referred to the High Court by the Income-tax Appellate Tribunal, under section 66 (1) of the Indian Income-Tax Act (XI of 1922), as amended by section 92 of the Income-tax (Amendment) Act (VII of 1939), in R.A. Nos. 656 to 661 (Madras) of 1953-54 on its file for decision on the following questions of law, *viz.*—

(i) Whether there was material for the Tribunal to hold that the business of stores and/or mills were separate and independent from the main shop, so as not to be entitled to any relief under section 25 (4) of the Act in respect thereof ?

(ii) Whether the assessee is entitled to an order under section 25 (*a*) (1) of the Act ?

* Case Referred No. 55 of 1954. 6th August, 1958.
(15th Sravana—1880-Saka.)

(iii) If the answer to question (ii) is in the negative, whether the Ceylon immovable properties and/or the shares in Avra Limited, belonging to the family ceased to be the assets of the joint family after 10th February, 1947 and the income therefrom arising thereafter required to be excluded from the assessment of the year 1947-48.

(iv) Whether the rates paid to the Colombo Municipality on the Ceylon house properties are deductible in computing the rental income therefrom in the four assessment years 1944-45 to 1947-48 ?

(v) Whether the dividend of Rs. 7,500 received in the ' previous year ' for 1945-46 assessment from the Beverly Estates, Ltd., Madras, is income exempt under section 4 (3) (*viii*) of the Income-tax Act ?

(vi) Whether the assessment in the assessment year 1947-48 of the gross income from the invesment of shares in Avra Ltd., before deduction of the Ceylon income-tax thereon, is valid and proper ?"

T. V. Viswanatha Ayyar and *S. Narayanaswamy*, Advocates, for Applicant.

C. S. Rama Rao Sahib, Special Counsel for Income-Tax, on behalf of Respondent.

The Judgment of the Court was delivered by

Rajagopalan, J.—Six questions were referred for the determination of this Court under section 66 (1) of the Income-tax Act. It may not be necessary to set out over again the relevant facts to answer some at least of the questions.

The fifth of the questions ran :

" Whether the dividend of Rs. 7,500 received in the ' previous year' for 1945-46 assessment from the Beverley Estates, Ltd., Madras, is income exempt under section 4 (3) (*viii*) of the Income-Tax Act?"

The answer to this question is concluded by the authority of the decision of the Supreme Court in *Mrs. Bacha F. Gizdar* v. *Commissioner of Income-tax*[1]. The question is answered in the negative and against the assessee.

The sixth question ran :

" Whether the assessment in the assessment year 1947-48 of the gross income from the investment of shares in Avra, Ltd., before deduction of the Ceylon income-tax thereon, is valid and proper?"

A similar question with reference to the provisions of the Ceylon Income-Tax Ordinance was considered by us in *Ramaswami Naidu and Govindaswami Naidu* v. *Commissioner of Income-tax*[2]. The principles we laid down in that case apply. The question is therefore answered in the negative and in favour of the assessee. The sum of Rs. 9,562, which was deducted by the Company before the dividends were paid to the assessee was never the income of the assessee.

The first question ran :

" Whether there was material for the Tribunal to hold that the business of stores and/or mills were separate and independent from the main shop, so as not be entitled to any relief under section 25 (4) of the Act in respect thereof?"

This question arises only in relation to the proceedings in the assessment year 1945-46. There was ample material on which the Tribunal could rest its conclusion that what were referred to as stores, mills and the main shop, each constituted a distinct line of business. The Tribunal, was therfore, jusified in coming to the conclusion that the relief under section 25 (4) of the Act had to be restricted only to the profits from the business designated the 'main shop' The question is answered in the affirmative and against the assessee.

Questions (ii) and (iii) arise out of proceedings of the assessment yeart 1947-48. Here again it may not be necessary to set out at any length the relevant facts which have already been set out in the statement of the case.

Question No. (ii) ran :

" Whether the assessee is entitled to an order under section 25-A (1) of the Act."

Question (iii) ran :

"If the answer to question (ii) is in the negative whether the Ceylon immovable properties and/or the shares in Avra, Ltd., belonging to the family ceased to be the assets of the joint family after

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1. (1955) S.C.J. 68 : (1955) 1 S.C.R. 876 : (1955) 1 M.L.J. (S.C.) 27 : 27 I.T.R. 1.

2. R.C. No. 27 of 1954.

10th February, 1947 and the income therefrom accruing thereafter required to be excluded from the assessment of the year 1947-48?"

The genuineness of the partition arrangements made with effect from 10th February, 1947, was never in issue. In the course of his arguments the learned counsel for the assessee could not really assail the correctness of the finding of the Tribunal, that though the shares of the three members of the quondam Hindu undivided family were defined, there was no allocation of the individual items of the immovable properties in Ceylon to each of the sharers. All that the learned counsel for the assessee could point out was that the income from this immovable property was divided in equal shares as shown in the accounts, and that each sharer enjoyed his share of income separately. That may not be sufficient to satisfy the requirements of section 25-A. The immovable property was certainly capable of division by metes and bounds and there was no such division. The income from the immovable properties in Ceylon even after 10th February, 1947, was therefore, liable to be assessed as the income accruing to a Hindu undivided family. Question (ii) is therefore answered in the negative and against the assessee.

In view of what we have recorded in considering the second question, there should be no further need to refer again to the income from the immovable properties in Ceylon in considering question (iii). We shall therefore, confine ourselves to the dividend income from the shares held by the three members of the quondam joint family in Avra Ltd. Even there our answer to question (ii) may have no real bearing on the assessment proceedings for 1947-48, because it was not shown to us that any dividend income accrued in the relevant year of account subsequent to 10th Februry, 1947. But this is a point that will have to be verified by the Tribunal in giving effect to our answer to the third question.

The relevant facts were as follows : The Hindu undivided family carried on three lines of business, referred to in the statement of the case as the main shop, the stores and the mills. With effect from 1st June, 1944, these three businesses were transferred to the limited company called Avra Ltd., Colombo, with 6,425 fully paid up shares of Rs. 100 each. Out of this each of the three members of the family, Veerappa Chettiar, Ramanatha and Adaikappan was allotted 2125 shares, and this holding continued to be shown in the books of the Company right through. It should be remembered that in June, 1944, all the three constituted an undivided family. The partition was with effect from 10th February, 1947. The Tribunal recorded in paragraph 8 of the statement of the case :

" . . . . nor were the 6,375 shares held by the family in Avra Ltd., albeit standing in the names of three members separately, re-transferred to them in their individual status on partition."

The further statement in paragraph 9 was :

" . . . . . nor the shares in Avra Ltd. which only stood in the names of the three members, as the nominees of the family and not in their own right, at any time, and continued to stand undisturbed as shown by Annexure E aforesaid, could be said to have been divided in definite portions within the meaning of section 25-A (1) of the Act, though their shares could be said to have been defined by virtue of the Annexures C and D aforesaid. . . . ."

We are really unable to follow the reasoning of the Tribunal. No doubt in 1944, when the shares were allotted to three individual members, they constituted a Hindu undivided family. Each of them *vis-a-vis* the company was the shareholder. *Inter se* the members their rights and liabilities were governed by their status as undivided members of a Hindu family. We really fail to see what more they need have done themselves to continue the registry as separate shareholders in the books of the company after the partition on 10th February, 1947. Their rights and obligations *inter se* as members of an undivided family ceased on 10th February, 1947. Their rights *vis-a-vis* the Company continued undisturbed as individual sharers. There can be no question for example of transferring 2,125 shares held by Veerappa to Veerappa himself on 10th February, 1947. The books of the assessee showed that the dividend income in the subsequent years was credited to each of the three members of the family. On the material on record the only conclusion that was possible was that the partition of the shares, which we would again stress governed the rights

inter se the three members of the family, was completed even on 10th February, 1947, itself, and that there was nothing further to be done to give effect to the allocation of the shares in the books of the Company. Even if a formal declaration by the members of the family were required, that was forthcoming. The Assistant Commissioner referred to the statement on oath made by the members that there were no assets left in common. That will certainly apply to the shares, though it may not help to satisfy the requirements of section 25-A (1) in relation to the immovable properties held in Ceylon.

Our answer to question (iii) is that the immovable properties in Ceylon did not cease to be the assets of the joint family after 10th February, 1947, but that the shares in Avra, Ltd., ceased to be the assets of the joint family after 10th February, 1947. The income accruing from the shares to each of the three members after 10th February, 1947, had to be excluded from the assessment of the Hindu undivided family.

The last of the questions we have to answer is question (iv) which ran :

"Whether the rates paid to the Colombo Municipality on the Ceylon house properties are deductible in computing the rental income therefrom in the four assessment years 1944-45 to 1946-48 ".

We have to answer this question with reference to the relevant provisions of section 9 (1) of the Income-tax Act, and the provisions of the Ceylon Municipal Councils Ordinance regulating the assessment, levy and collection of rates on houses in Ceylon.

The relevant provisions of section 9 (1) of the Income-tax Act ran :

"The tax shall be payable by an assessee under the head 'income from property' in respect of the *bona fide* annual value of property consisting of any buildings or lands appurtenant thereto of which he is the owner. . . . . . subject to the following allowances, namely :

* * * * * *

(iv) Where the property is subject to a mortgage or other capital charge, the amount of any interest on such mortgage or charge; where the property is subject to an annual charge not being a capital charge, the amount of such charge; where the property is subject to a ground rent, the amount of such ground rent; and where the property has been acquired, constructed, repaired, renewed or reconstructed with borrowed capital, the amount of any interest payable on such capital.

* * * * * *

Explanations.—For the purpose of clause (iv) of this sub-section, the expression 'annual charge' does not include any tax in respect of property or income from property levied by a local authority or a State Government or the Central Government."

The relevant portion of section 115 (1) of the Municipal Council's Ordinance, Ceylon, ran :

" . . . . the Council shall from time to time, so often as they think necessary, make and assess with the sanction of the Governor any rate or rates on the annual value of all houses and buildings of every description, and of all lands and tenements whatsoever within the town.

Such rate or rates—

(*a*) shall endure for any period not exceeding twelve months,

* * * * * *

(*b*) shall be payable by such instalments and at such times as the Chairman, with the sanction of the Council, shall direct. . . . .

As the learned counsel for the assessee pointed out, that made it clear that the rates were annual ; it was the annual rental value that furnished the basis. That conclusion is reinforced by section 117 (8) which runs :

" Every assessment against which no objection is made shall be final for the year."

Section 135 of the Ordinance provided for the recovery of unpaid rates assessed on house property. It authorised recovery by

"seizure and sale of all and singular the movable and immovable property of the proprietor, or of any joint proprietor, of the premises on account of which such rate or rates may be due, and of

all movable property, to whomsoever the same may belong, which may be found in or upon any such premises."

Under section 138 of the Ordinance the property seized under the provisions of section 135 could be sold. Section 142 directed that, if land, or other immovable property was thus sold, it was to vest in the purchaser free from all encumbrances.

There was nothing in the Ceylon Municipal Councils Ordinance correspondent for instance to section 103 of the Madras City Municipal Act which runs :

"The property tax on buildings and lands shall, subject to the prior payment of the land revenue, if any, due to the Government thereon, be the first charge upon the said buildings or lands and upon movable property, if any, found within or upon such buildings or lands and belonging to the person liable to such tax".

Section 85 is an analogous provision in the Madras District Municipalities Act V of 1920.

Thus the position in Ceylon is, that the owner of the house assessed to Municipal rates is under a legal liability to pay those rates. Those rates are annual but provision is made under the Statute for payment of these rates in instalments. Whether factually any instalments were fixed is not clear from the material made available to us. For non-payment of the rates any property of the defaulting owner is liable to seizure and sale. We can leave out of account the liability of properties, belonging to others but found on the premises assessed to municipal rates, to seizure and sale for non-payment of these rates. No provision is made by the laws in Ceylon for making the house property on which the rates are assessed security for the payment of those rates. As we pointed out, there is nothing analogous to section 103 of the Madras City Municipal Act, which makes the tax a first carge on the house property, and makes the house security for the payment of the house tax. There is nothing in the Ceylon law even to indicate that the income from the house property is a source from which the assessed rates have to be paid. That, of course, leaves in tact the statutory liability imposed on the owner of the house property to pay the annual rate assessed on that property by the Municipal authorities.

Is the liability of the assessee to pay these Municipal rates in Ceylon an "annual charge" within the meaning of section 9 (1) (iv) of the Income-tax Act is the question.

We have already pointed out that the liability to pay the rates was annual, though the Ceylon Ordinance permitted the payment in instalments. If such a liability otherwise constitutes an annual charge, the statutory provisions to discharge that liability in instalments does not make it any the less an annual charge. That is concluded by the decision of the Supreme Court in *New Piece Goods Bazar Co., Ltd.* v. *Commissioner of. Income-tax, Bombay*[1].

The next question is does the word "charge" in section 9 (1) (iv) import anything more than a liability to pay an ascertained or ascertainable amount. We have pointed out that under the laws in Ceylon the house property itself was not constituted security for the dicharge of the liability to pay the assessed Municipal rates. Nor was the income from that house property indicated as the source from which the rates had to be paid. The learned counsel for the assessee contended that all that the expression "annual charge" in its context in section 9 (1) (iv) of the Act meant was that it should be a payment or discharge of an annually recurring liability, that "annual charge" meant nothing more than an annual payment, and that there was no scope to restrict it further by requiring that the house property in question should be security for that payment. He relied on the the observations of Chakravarthi, C.J., in *Commissioner of Income-tax* v. *State Bank of India*[2] :

" I would only add here that the word 'charge', as used in section 9 (1) (iv) must mean payment and not security. The relevant words of the section are: 'Where the property is subject to an annual charge. . . . . the amount of such charge.' Clearly, the phrase ' the amount of such charge' indicates that the word ' charge ' used in the earlier phrase also means payment. It would be

1. (1950) S.C.J. 437 : (1950) 18 I.T.R. 516. 2. (1957) 31 I.T.R. 545.

singularly inappropriate "to use the word 'charge' if security was intended, for 'annual security' would be wholly meaningless. That the meaning is 'payment' would also seem to be clear from the *Explanation* appearing after clause (vii) of the sub-section where it is said that the expression 'annual charge' in clause (iv) does not include any tax in respect of property or income from property, if such tax is of a certain kind".

The question, whether the expression 'annual charge' should be construed as meaning only an annual payment without any reference to security for that payment did not really rise for determination in *Commissioner of Income-tax* v. *State Bank of India*[1]. The payments the learned Chief Justice had to consider in that case were specifically charged upon the house property in question there, in the sense that the house property was constituted security for those payments. Though the observations are *obiter* they come from so experienced and learned a Judge, they are certainly entitled to great respect. With all respect to the learned Chief Justice, we regret our inability to accept as correct the interpretation he placed upon the expression 'annual charge' in its context section 9 (1) (iv) of the Act.

It is true that the question whether the expression 'annual charge' meant annual payment plus security for that payment did not directly arise in that form for consideration in the case decided by the Supreme Court, *New Piece Goods Bazaar, Co., Ltd.* v. *Commissioner of Income-tax, Bombay*[2], The enactments their Lordships had to consider in that case specifically imposed a statutory charge on the house properties for the unpaid arrears of house tax. Their Lordships, however, had to construe the scope of the expressions 'capital charge' and 'annual charge' as they occur in section 9 (1) (iv). It may not therefore be strictly accurate to view these observations as *obiter dicta;* but even as *obiter*, the observations of their Lordships of the Supreme Court are entitled to the highest respect.

Section 9 (1) (iv) of the Act, it should be remembered, refers to an annual charge other than a Capital charge. Earlier in section 9 (1) (iv) the distinction is between a mortgage and a capital charge. Obviously the same meaning should be given, if possible to the expression 'capital charge' wherever it occurs in section 9 (1) (iv). In construing the scope of capital charge' and in dealing with the expression 'annual charge' other than a 'capital charge' Mahajan, J., said at page 519 in *New Piece Goods Bazaar, Co., Ltd.* v. *Commissioner of Income-tax, Bombay.*[2]

> "We are therefore of opinion that capital charge here could only mean a charge created for capital sum, *i.e.*, a charge to secure the discharge of a liability of a capital nature."

After recording with approval the principle laid down by the Allahabad High Court in *Goppu Mal Kanhaiya Lal* v. *Commissioner of Income-tax*[3] Mahajan, J., proceeded:

> "It was said that if an annual charge means a charge to secure the discharge of an annual liability, then, capital charge means a charge to secure the discharge of a liability of a capital nature. We think this construction is a natural construction of the section and is right".

His Lordship referred again to the need for the existence of a charge on the property for the discharge of the liability for the annual payment when he observed at page 523 :

> "Municipal taxes, on the other hand, do not stand on the same footing as land revenue. The law as to them varies from province to province and there may not be necessarily a charge on property in all cases. The legislature seems to have thought that so far as municipal taxes on property are concerned, if they fall within the ambit of clause (iv), deduction will be claimable in respect of them but not otherwise."

In view of the principles laid down by the Supreme Court in *New Piece Goods Bazaar, Co., Ltd.* v. *Commissioner of Income-tax, Bombay*[2], we think that the question at issue before us is not really *res integra.*

In Burrows on 'Words and Phrases', Vol. I, pages 411-12 the first passage under the heading 'charge' runs :

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1. (1957) 31 I.T.R. 545. (S.C.).
2. (1950) S.C.J. 437 : (1950) 18 I.T.R. 516
3. 13 I.T.R. 210.

"A charge differs altogether from a mortgage. By a charge the title is not transferred, but the person creating the charge merely says that out of a particular fund he will discharge a particular debt".

The next passage runs:

"The word 'charge' may well be used to describe a burden imposed upon land and if a payment has to be made in respect of land, and it can only be enjoyed subject to the liability for that payment, I cannot think that there would be any great straining of language if it were spoken of as charged upon the land".

This second passage is an extract from the speech of Lord Herschell in *Payne* v. *Esdaile*[1]. This passage taken by itself out of its context might appear to support the contention of the learned counsel for the assessee, that the use of the expression 'charge' by itself could imply nothing more than a mere liability to pay. But to understand the scope of the observations of Lord Herschell we have to examine the context in which he made these observations. At page 622 of the Report he prefaced a discussion of the meaning to be given to the expression 'charge' in the relevant statutes which their Lordships had to construe by saying:

"The Court of Appeal have held that the payment in question is not within this definition, because though an annuity or periodical payment it is not charged upon or payable out of land. I gather that they interpreted the words 'charged upon' as applicable only to those cases in which there was some remedy against the land itself. It may be admitted that this is the most common signification of the words, and is the meaning that would be attributed to them if there were nothing in the context to lead to a different conclusion."

Lord Herschell then proceeded to examine the context, also in relation to the previous enactments on the same subject, and after pointing out at page 625 " the question is certainly not free from difficulty" he summed up " ......upon the whole I have come to the conclusion that the judgment of the Court below on this point was erroneous......'

If the test were, does the context of section 9 (1) (iv) require a meaning different from that of the normally accepted signification in law of the expression 'charge' justifies, our answer is in the negative. If we may say so with respect, Chakravarthi, C.J., appears to have isolated the passage "where the property is subject to an annual charge......the amount of such charge" in his observations at page 559 of *Commissioner of Income-tax* v. *State Bank of India*[2]. The expression "charge" occurs more than once in section 9 (1) (iv), and there is also the *Explanation* to consider. The familiar legislative pattern in India is to charge the house property with the liability for the house tax. Often it constitutes the first charge on the house property, subject to the claims of the Government for land revenue. These were in fact the charges excluded by the *Explanation.* If the tax itself did not constitute an annual charge, obviously there would be no scope for recourse to the *Explanation* to exclude it from the scope of section 9 (1) (iv). As pointed out by the Supreme Court in *New Piece Goods Bazaar, Co., Ltd.* v. *Commissioner of Income-tax, Bombay,*[3] if the expression capital charge has to be construed as a charge created for a capital sum, that is, to secure the discharge of a liability of a capital nature, the expression annual charge in that context should mean, again in the words of Mahajan, J., a charge to secure the discharge of an annual liability.

We are clearly of opinion that the word "charge" in the statutory expression "annual charge" in section 9 (1) (iv) connotes something more than a mere liability to pay something more than the the annual payment. Both the concepts are involved, liability to pay and a charge on the house property for the discharge of that liability. That charge can be contractual or statutory. It can be express or it can be

1. (1888) L.R. 13 A.C. 613 at 623.
2. (1957) 31 I.T.R. 545.
3. 1950) S.C.J. 457 : (1950) 18 I.T.R. 516 (S.C.).

implied. If, for instance, the income from the property is shown as the source from which the liability is to be discharged law would imply a charge for that amount. In the present case there was no charge for the payment of the assessed Municipal rates, express or implied. To sum up, the annual charge in the context of section 9 (1) (iv) means an annual payment charged upon the house property, just as capital charge means payment of a capital nature charged upon the house property.

In rejecting the assessee's claim to deduct the municipal rates assessed on the assessees' house property in Ceylon, the Tribunal recorded:

"It was argued that the *Explanation* to section refers only to the tax levied by a local authority or a State Government or Central Government of the Republic of India and the rates paid to the Municipality of Colombo are not within the aforesaid prohibition, the deduction claimed is undoubtedly an annual charge, not of the nature of a capital charge and consequently permissible under section 9 (1) (iv). This argument, though attractive, is clearly untenable as assessment of even foreign properties require to be made under section 9 and the sub-section will consequently require to be read "*mutatis mutandis.*"

It was on the application of the *Explanation* that the Tribunal rejected the claim. We have already pointed out that the *Explanation* would apply only if the Municipal rates had constituted an annual charge within the meaning of section 9 (1) (iv). We have held that they did not constitute such an annual charge. There is therefore no necessity for us to examine, in these proceedings the scope of the *Explanation*, to verify if it would refer to taxes or rates imposed by authorities outside India.

As the Municipal rates payable by the assessee under the laws in Ceylon did not constitute an annual charge within the meaning of section 9 (1) (iv) of the Act, the assessee was not entitled to claim the payment towards those rates as lawful deductions permitted by section 9 (1) of the Act.

We answer the fourth question in the negative and against the assessee.

As neither side has wholly succeeded in this reference there will be no order as to costs.

V.S. ——— *Answered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Shri Vasudeva Bank, Ltd., by its Managing Director, N. V. Swaminatha Iyer, having its head office at Mayanoor, Tiruchirapalli District .. *Appellant**

v.

The Union of India by Secretary, Central Board of Revenue, New Delhi .. *Respondent.*

Central Excises and Salt Act (I of 1944), section 11, 40 (1) and (2)—Order to attach and sell the Goods for excise duty dues—Liability of the Government for acts done by its servants—Scope and Extent of—Good faith—What constitutes—Limitation for suits against Government for such acts.

Section 11 of the Central Excises and Salt Act empowers the Government to attach and sell one variety of goods for the escise duty payable on another variety of goods belonging to the same owner.

In a suit for damages against Government for wrongful attachment and sale of goods the plaimtiff has to establish that the Excise Department unnecessarily and improperly withheld the goods and that the detention of the goods was the direct cause of the alleged deterioration of the goods and its fetching a low price at the Court-sale.

The burden is upon the plaintiff to show want of good faith on the part of the Excise Officials.

Under section 40 (1) of the Act the action by the Excise officials was done in good faith and one ordered to be done under the Act and under sectiou 40 (2) the suit was barred by limitation as one filed after the expiration of six months from the date of the accrual of the cause of action.

Appeal against the Decree of the District Judge of Tiruchirapalli, in Appeal Suit No. 156 of 1955, preferred against the Decree of the Court of the Subordinate Judge of Tiruchirapalli, in Original Suit No. 252 of 1951.

V. Sundaresan, for Appellant.

The Government Pleader (*B. V. Viswanatha Ayyar*), for Respondent.

* S.A. No. 726 of 1956.

9th October, 1958.
(17th Asvina, 1880—Saka).

The Court delivered the following

JUDGMENT.—This second appeal is preferred against the decree and judgment of the learned District Judge of Tiruchirapalli in A.S. No. 156 of 1955, confirming the decree and judgment of the learned Subordinate Judge of Tiruchirapalli, in O.S. No. 252 of 1951.

One E. A. Rahamatullah, a tobacco merchant, had a warehouse licensed for storage of tobacco. This tobacco consisted of two varieties known as cheroot tobacco and beedi tobacco. Exhibit A-1 is a pattial of tobacco showing the purchase of 51 bags of tobacco. Exhibit A-2 is another pattial dated 20th August,. 1946, showing the purchase of 45 bags of tobacco. Rahamatullah kept this tobacco in a warehouse licensed for storage of tobacco.

Under rule 140 of the Central Excises and Salt Rules, the Collector is given power to appoint public warehouses and in like manner license private warehouses for the storage of excisable goods on which duty has not been paid, and rule 144 says that the goods should not be removed from any warehouse except on payment of duty or where so permitted. Rule 152 says that subject to the limitation imposed by rule 139, any owner of goods wherehoused under these rules may at any time within two years from the date on which such goods were first warehoused and with the permission of the proper officer and on such conditions, remove such goods from one warehouse to another. In the case of a private warehouse under rule 140 the licensee has to furnish a bond with such surety or sufficient security in such amount and under such conditions as the Collector approves, binding himself to pay the duty due on the goods deposited therein, or for the due and safe removal of such goods and for the due observance of the terms, conditions and requirements of the Act.

Rahamatullah, who stored the tobacco in his warehouse obtained a license from the Department for storing and he executed a security bond along with one Sundaram Pillai as surety to abide by the Excise Rules and for the payment of the amount due to the Government by way of duty, etc. The tobacco stored in such licensed godowns known as bonded warehouses can be removed only with the permission of the Excise Department on payment of duty payable on the goods. They could also be removed on permission from one bonded warehouse to another.

Rahamatullah pledged the cheroot tobacco stored in his bonded warehouse to the plaintiff bank and borrowed Rs. 4,250, Rs. 2,000 on 13th July, 1946 and Rs. 2,250 on 9th September, 1946. This is stated to have been a key-loan.

In August, 1947, it was noticed by the Excise Department that certain quantities of cheroot tobacco were missing. The duty payable in respect of such tobacco was 1,007-7-0. Sundaram Pillai who stood surety for Rahamatullah also became apprehensive as he suspected the transaction of Rahamatullah. He therefore applied to the Department to permit the removal of the tabacco from the godown of Rahamatullah to his own godown at Varaganeri, Tiruchirapalli, and Rahamutullah was agreeable to such removal and re-storage.

Therefore, on 21st August, 1947, on the application made by Rahamatullah permission was granted and the entire tobacco was removed from the godown of Rahamatullah at 99, Pallivasal, Tanjore Road, Tiruchirapalli, to the godown of Sundaram Pillai at No. 2, Varaganeri Road, Tiruchirapalli. It is this removal on 21st August, 1947, that has given rise to the present controversy.

The Department claimed that a sum of Rs. 1,007-7-0 was due as duty in respect of the cheroot variety found missing or removed from the warehouse. The plaintiff bank then wrote to the Department on 25th August, 1947 (Exhibit A-3) stating that Rahamatullah had pledged with the bank on 13th July, 1946, 51 bundles of tobacco and borrowed Rs. 2,000 on the security thereof and again pledged with the bank on 9th September, 1946, 45 bundles of tobacco and borrowed Rs. 2,200 on the security thereof and executed an undertaking to keep the goods under the lock and seal of the plaintiff bank, that the bank had accordingly locked and sealed the godown with the bank's lock, that a sum of Rs. 3,500 was still due and in respect of the same the bank

had a first charge next in order to Government charge, if any, and in case of disposal of the said goods under the authority of the Department for any reason, it should be noted that the bank had a first charge and might be informed of any such disposal so as to enable the bank to take such steps as are necessary to safeguard its interests in the pledged goods. This letter was sent four days after the removal of the goods to Sundaram Pillai's godown and it was received by the Assistant Commissioner of Excise on 26th August, 1947. The defendant sent word to the plaintiff bank that a sum of Rs. 1,007-7-0 was due as duty by Rahamatullah to Government. The bank then remitted the said amount into the Government Treasury and wrote to the Department on 6th September, 1947 (Exhibit A-4). The bank wrote therein that the sum of Rs. 1,007-7-0 having been paid, the tobacco under pledge to the bank should be delivered to the bank. The wording is "We request you to arrange to give us delivery of the tobacco seized by you. We will keep it under our custody and act up to your instructions." Exhibit A-5 is the letter dated 5th December, 1947, received by the bank's advocate from the Assistant Collector of Central Excise stating that excepting for a small quantity of 534 lbs. the tobacco has been transferred by Rahamatullah to the warehouse of Sundaram Pillai, that Sundaram Pillai is holding the tobacco in his custody pending adjudication of a case registered against Rahamatullah and that the clearance of the tobacco for house consumption would be permitted on the application by the parties concerned in the usual way on the adjudication of the case referred to and on realising all dues due to Government from Rahamatullah and that in case the dues are not realised the stock would be attached by the Department under section 11 of the Central Excises and Salt Act, 1944 and will be put in auction. A sum of Rs. 500 was payable by Rahamatullah as penalty and the same was paid. In Exhibit A-6 dated 9th March, 1948, the Department stated that it had no objection for the removal of the tobacco belonging to Rahamatullah, the fine amount of Rs. 500 having been paid. By Exhibit A-7 dated 11th March, 1948, the plaintiff requested the Department to hand over the tobacco. In reply to this letter the Superintendent of Central Excise, Tiruchirapalli, wrote to the Deputy Superintendent, Palakarai, Exhibit A-8 to arrange to return the tobacco seized from Rahamatullah back to the owner. The bank once again wrote Exhibit A-9 dated 5th May, 1948, to the Department requesting delivery and stating that if delivery was delayed the bank would be constrained to hold the Government responsible and take legal action for any loss incurred by by the bank and it was specifically mentioned therein that the tobacco was seized from the bank's custody even without the knowledge of the bank. The Department replied by Exhibit A-10 dated 12th July, 1948, that Rahamatullah had not accounted for the quantity of 2,275 lbs. of beedi tobacco non-duty paid, which was in stock in his warehouse and it was believed that he had clandestinely disposed of the same and that the excise duty recoverable on the missing tobacco came to Rs. 1,279-11-0 and as by virtue of section 11 of Central Excises and Salt Act of 1944 the Government had priority over all other claims, the Assistant Collector had under section 11 of the said Act attached the stock of Excisable tobacco belonging to Rahamatullah and ordered its sale, and after appropriating the amount due to the Government the surplus, if any, would be held in deposit and that the bank should proceed against its debtor according to law. It was further stated in that letter that Rahamatullah had hypothecated his excisable tobacco lodged in his licensed warehouse without the knowledge or consent of the Department, that the question of the bank holding possession or custody of the tobacco did not arise and the premises did not appear to have been locked with the bank's lock, that any pledge or hypothecation of the tobacco would not confer any right to ownership or possession of the goods in favour of the hypothecatee or pledgee as against the Government in view of the provisions of Rules 140, 144, 148, 172, 174 and 178 of the Central Excise Rules, 1944 and that the Government would not accept any liability for loss, if any, incurred by the Bank.

In other words, the Department was insisting on the payment of the duty of Rs. 1,279-11-0 payable in respect of the beedi tabacco. The attachment was under section 11 of the Central Excise Act. The entire proceedings of the Department in the matter of detention of cheroot tobacco belonging Rahamatullah in respect of

duty payable on the beedi veriety was under the Central Excise Act, as is evident from the correspondence Exhibit B-3 dated 1st April, 1948, which is a copy of a report made by the Deputy Superintendent of Excise, Palakarai Range, to the Superintendent of Central Excise, Tiruchirapalli, shows the action taken by the Deputy Superintendent, in the matter of recovery of duty on the beedi tabacco. He suggests that the tobacco deposited with Sundaram Pillai have to be attached under section 11 to compensate the excise duty due to the State on account of the beedi tabacco. Exhibit B-4 is a copy of memo. dated 1st April, 1948, to Rahamatullah calling upon him to produce the warehouse accounts and also to produce the tobacco for inspection and stating that if the memo. is not complied with, the cheroot tobacco will be attached. Exhibit B-6 is a copy of the order of the Assistant Collector of Central Escise attaching the stock of 7,997 lbs. of excisable cheroot tobacco of Rahamatullah under section 11 of the Act and directing sale of the tobacco in public auction forthwith for recovery of the dues and that the surplus proceeds will be held in deposit pending its final disposal. Exhibit B-7 is a demand notice for Rs. 1,279-11-0 payable by Rahamatullah and this was served on Sundaram Pollai, as Rahamatullah was absconding. Both these Memos. Exhibits B-6 and B-7 contain the reference in the heading "C. No. IV (offence) 85/48". The Department had therefore treated the removal of the beedi tobacco as an offence and the proceedings were all with reference to that offence. Exhibit B-8 dated 6th August, 1948, is the copy of the proceedings of attachment sent to Superintendent, Tiruchirapalli, giving instructions as to the procedure to be adopted in the matter of putting up the tabacco for sale. In pursuance of the directions of the Assistant Collector of Excise, the Superintendent of Central Excise, Tiruchirapalli, issued notification for the sale of the tabacco in public auction on 16th August, 1948, at Palakarai Range Office. The plaintiff bank immediately filed O.S. No. 130 of 1948 for the money due from Rahamatullah and got the tabacco attached before judgment. The Government preferred a claim to the tobacco in I.A. No. 896 of 1948 and the claim was dismissed ; *vide* Exhibit A-11, copy of the order. The Government did not file a suit to set aside that summary order.

After the dismissal of the claim petition the Department did not object to the plaintiff bank proceeding against the attached tabacco and it was sold, some quantity in March, 1949, for Rs. 466-9-0 and the balance in April, 1949, for Rs. 1,198-8-0 to the plaintiff bank who had obtained permission to bid and set off.

It is in these circumstances that the suit, out of which the present second appeal arises, was filed and the sum and substance of the bank's claim is that it had avanced Rs. 4,250 to Rahamatullah on the pledge of tobacco, that Rahamatullah is absconding, that the money had to be realised only by sale of the tabacco pledged and that as the Government were improperly detaining the tobacco and refusing to deliver it, the tobacco got deteriorated and therefore fetched only Rs. 1,665-1-0. The plaintiff bank says that the tobacco was in the bank's possession and it was the defendant who broke open the lock and removed the same. Inasmuch as this has been brought about by the wrong and illegal act of the Department, the plaintiff is entitled to recover the entire mortgage amount from the Department by way of damages.

Both the Courts below held that the plaintiff bank is not entitled to the damages asked for and dismissed the suit. Hence this second appeal by the defeated bank.

In this second appeal I am of the same opinion as the Courts below that the plaintiff bank is not entitled to damages by reason of the protection given to the Central Excise servants under section 40 of the Central Excises and Salt Act, 1944 and the bar of the suit by limitation under sub-section (2) of section 40 aforesaid.

The relevant provisions of the Central Excises and Salt Act, 1944, may now be examined. Section 2 (*d*) of the said Act defined "excisable goods" as meaning goods specified in the First Schedule as being subject to a duty of excise and includes salt. It was sought to be argued that once the duty is paid, the goods cease to be excisable. But the unfounded character of this argument is seen from section 8. That section lays down that

"from such date as may be specified in this behalf by the Central Government by notification in the Official Gaeette, no person shall except as provided by rules made under this Act have in his possession any goods specified in the Second Schedule in excess of such quantity as may be prescribed for the purposes of this section as the maximum amount of such goods or of any variety of such goods which may be possessed at any time by such a person."

In other words, the qualifying phrase means nothing more than the class of goods set out in the Second Schedule, and they do not cease to be such on payment of duty but remain as such so long as they remain in the possession of the person specified in section 8. Section 40 of the Act lays down :

"(1) No suit shall lie against the Central Government or against any officer of the Government in respect of any order passed in good faith or any act in good faith done or ordered to be done under this Act.

(2) No suit, prosecution or other legal proceeding shall be instituted for anything done or ordered to be done under this Act after the expiration of six months from the accrual of the cause of action or from the date of the act or order complained of."

Rule 215 of the Central Excise Rules, states :

"The provisions of sections 168, 189 and 192 of the Sea Customs Act, 1878, shall *mutatis mutandis* be applicable to any decision or order relating to any duty, fine or penalty leviable in respect of any goods under the Act."

In Central Excise Manual, Appendix II, page 144, the provisions of Sea Customs Act applied to certain procedure in respect of excisable goods are mentioned. Section 192 says that when any fine, penalty or increased rate of duty is leviable the goods in respect of which such fine or rate or penalty is leviable shall not be removed by the owner until such fine, penalty or rate is paid. Then it states that if any person has become liable to any such fine, penalty or rate, in respect of any goods, the Customs-Collector may detain any other goods belonging to such person passing through the customs house until such fine, penalty or rate is paid.

The law regarding the vicarious liability of the Government of India for acts done by its servants, in cases of this nature, are clearlyset out in S. Ramaswami Iyer's "Law of Torts" (Fifth edition) at pages 622 to 624 as follows :

"(iii) The Government is liable for injury to any of its subjects resulting from an act done by itself or by its servants if such act is done under colour of municipal law, as when it purports to be in the exercise of powers conferred by a statute. Actions have been allowed against the Government for illegal levy of customs under the Customs Act, the illegal acquisition of land under the Land Acquisition Act, the improper dismissal of a councillor of a municipality under the District Municipalities Act. In an action for malicious prosecution against Government, the malice of its officer will be imputed to it. (*Haribhanji* v. *Secretary of State*[1] ; *Secretary of State* v. *Mask & Co.*[2] ; *Thinvick* v. *Secretary of State*[3] ; *Rameshwar Singh* v. *Secretary of State*[4] ; *Vijiaraghava* v. *Secretary of State for India*[5] ; *Secretary of State for India* v. *Somayya*[6] ; *Mahajrah Bose* v. *Gorernor-General in Council*[7].

(iv) The Government is liable to restore property or money wrongfully obtained or detained by it or its servants on its behalf. In such cases an action lies against the Government as a petition of right lay against the Crown in England. The Assam High Court allowed a claim against the Union of India for compensation for earth wilfully taken from the plaintiff's land and laid on a railway track. The wrong would amount to conversion of moveable property and should have been committed by some one, servant or contractor, on behalf of the Government. *Secretary of State for India* v. *Moment*[8] ; *Secretary of State for India* v. *Hiru Mandal*[9], *Saurashtra* v. *Thakur*[10] ; *Kailash Chandra* v. *Secretary of State*[11] ; *Washappa* v. *Secretary of State for India*[12] ; *India* v. *Muralidhar*[13].

(v) The Government is not liable for a wrong done by its servants in the course of their official duties unless the wrong was expressly authorised or ratified by it. This principle was enunciated by Wallis, J., as he then was, in a Madras case (*Ross* v. *Secretary of State for India in Council*[14]), where a suit for damages against the Government for loss caused to the plaintiff by the wrongful closing of a labour depot by a District Magistrate purporting to act under statutory powers, was dismissed.

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1. (1882) I.L.R. 5 Mad. 273.
2. (1939) F.L.J. 15 : (1940) 2 M.L.J. 140 : L.R. 67 I.A. 222: I.L.R. (1940) Mad. 599 (P.C.).
3. I.L.R. 1939 (1) Cal. 257.
4. (1907) I.L.R. 34 C. 470.
5. (1884) I.L.R. 7 Mad. 466.
6. (1926) 51 M.L.J. 446 : A.I.R. 1926 Mad. 1084.
7. A.I.R. 1952 Cal. 242.
8. (1912) 24 M.L.J. 459 : L.R. 40 I.A. 48 : I.L.R. 40 Cal. 391 (P.C.).
9. A.I.R. 1935 Cal. 752.
10. A.I.R. 1956 Sau. 65.
11. (1912) I.L.R. 40 Cal. 452.
12. (1915) I.L.R. 40 Bom. 200.
13. A.I.R. 1952 Assam 141.
14. (1913) 24 M.L.J. 429 : I.L.R. 37 Mad. 55.

Similarly, the Government has been held not liable for an improper arrest. (*Maharani of Nabha* v. *Madras*,[1] or seizure of property by a police officer (*Babulal* v. *Province of Orissa*[2], for loss due to a payment of money by a Deputy Collector to a person not entitled to it. (*Secretary of State for India* v. *Ramnath Bhatta*[3], and for negligence in his custody of plaintiff's property resulting in theft (*Ram Gulam* v. *Uttar Pradesh*[4], *Shivabhanjun* v. *Secretary of State for India*[5] ; *Mohammed* v. *Uttar Pradesh*[6]. The principle of these cases was stated to be that the act done by a servant of Government was done in the exercise of the authority or discretion vested in him by law or statute and not in pursuance of any implied authority of Government (*District Board, Bhagalpur* v. *Province of Bihar*[7] ; *Gopal Singh* v. *Union of India*[8].) It is difficult to accept this reasoning, as vicarious liability does not rest on any principles of implied authority. Much less does it require express authority or ratification by the employer. This requirement is intelligible in the case of a superior servant sought to be held liable for an act of his subordinate but has no meaning in the case of the Government who is the ultimate employer. It is submitted that the rule is that the Government is liable for an illegal act of its servant or agents in the course of performing its work. This of course assumes that the act is illegal and a suit lies against him. Otherwise, there can be no suit against Government as employer.

The view here submitted receives confirmation from a decision of the Calcutta High Court (*Maharana Bose* v. *Governor-General in Council*[9], in which Mitter, J., held that the Government could become liable for malicious prosecution of the plaintiff by Railway Officers purporting to act under their powers under the Railway Act.

The Law Commission has recommended changes in the law which would remove some of the restrictions on the liability of Government as employer."

The Law Commission of India in its First Report (Liability of the State in Tort, 1956) published by the Government of India, Ministry of Law, after examining the existing law in India and the law in England (for a fuller discussion in regard to the law in England, see Street's Government Liability, Cambridge University Press), America, Australia and France, has set out its conclusions at pages 36 to 43. In Appendix 1 is set out the list of cases in which the State's liability was negatived. *Kessoram Poddar & Co.* v. *Secretary of State for India*[10]; *Secretary of State* v. *A. Cockcraft*[11]; *Mata Prasad* v. *Secretary of State*[12]; *Kader Zailany* v. *Secretary of State*[13]; *Ross* v. *Secretary of State*[14]; (reviews all decisions English and Indian); *Nobin Chunder Dey* v. *Secretary of State for India*[15]; *Secretary of State for India in Council* v. *Sri Gobinda Chaudhuri*[16]; *Secretary of State* v. *Ramnath Bhatta*[3] ; *Sajida Khatoon* v. *M. B. Ahmad*[14]; *Uday Chand* v. *Province of Bengal*[18]; *Ram Gulam* v. *U. P. Government*[19]; *McInerny* v. *Secretary of State for India*[20] ; *Durgacharan* v. *Isamuddin*[21] ; *Etti* v. *Secretary of State*[22] ; *Shivabhajan* v. *Secretary of State for India*[5]. The 11th instance based on *McInerny* v. *The Secretary of State for India*[20], relates to negligent acts of servants of the Government and the Crown not being liable for negligent or tortious acts of its officers done in the course of their official duties imposed by statute, except where it could be proved that the impugned act was authorised by the Crown or that it had profited by its performance. In Appendix V is set out the Protection Clauses in Indian Acts giving immunity to the State, which were 72 in number. No 39 of the list is the Central Excises and Salt Act I of 1944, section 40. The Law Commission in its proposal at page 38 and following has formulated the following principles on which legislation should proceed under the general law *viz.*, the State as employer should be liable for the torts committed by its employees and agents while acting within the scope of their office or employment, and the State as employer should be liable in respect of breach of those duties which a person owes to his employees or agents under the general law by reason of being their employer and that in respect of these the State should be entitled to raise the same defences which a citizen would be entitled to raise under the general law. Then turning to duties of care imposed by statute, the Law Commission formulates the principles that the State should be

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1. (1944) 1 M.L.J. 399.
2. A.I.R. 1954 Orissa 225.
3. (1933) 37 C.W.N. 957.
4. (1950) A.L.J. 46.
5. (1904) I.L.R. 28 Bom. 314.
6. A.I.R. (1955) U.P. 75.
7. A.I.R. 1954 Pat. 529.
8. A.I.R. 1957 Raj. 17.
9. A.I.R. 1952 Cal. 242.
10. (1926) I.L.R. 54 Cal. 969.
11. (1914) I.L.R. 39 Mad. 351.
12. (1929) I.L.R. 5 Luck. 157.
13. (1931) I.L.R. 9 Rang. 375.
14. (1913) I.L.R. 37 Mad. 55.
15. (1875) I.L.R. 1 Cal. 11.
16. (1932) 36 C.W.N. 606.
17. A.I.R. 1950 All. 56.
18. I.L.R. (1947) 2 Cal. 141.
19. A.I.R. 1950 All. 206.
20. I.L.R. (1911) 38 Cal. 797.
21. (1946) 51 C.W.N. 534.
22. (1939) 1 M.L.J. 784 : I.L.R. (1939) Mad. 438 : A.I.R. 1939 M. 663.

liable without proof of negligence for breach of a statutory duty imposed on it or its employees which causes damage and that the State should be liable if in the discharge of statutory duties imposed upon it or its employees, the employees act negligently or maliciously, whether or not discretion is involved in the exercise of such duty.

See also, with reference to this Governmental Liability in India, page 95 of T. S. Venkatesa Iyer's "Law of Torts" (English and Indian), and Anand and Sastri's "Law of Torts" (1952), page 350).

From the above exposition of Governmental liability, emerges the further question as to what constitutes good faith which would protect Government servants in the discharge of their statutory duties.

The meaning of the term "good faith" can be gathered from the following Law Lexicons :

Roland Burrows : Words and Phrases Judicially defined.

"Good faith requires not, indeed logical infallibility but due care and attention."

"Good faith", therefore, means absence of knowledge that a preference was intended."

Funk & Wagnalls. (New Standard Dictionary of the English Language (1953).

"Good faith—the observance of, or the intention to observe, honesty and fair dealing ; absence of intention to deceive."

Stroud's Judicial Dictionary, 3rd edition (1953).

"In good faith" Bankruptcy Act, 1883, would seem to mean innocent of the knowledge, and of the means of knowledge, that there is an adverse bankruptcy.

"A thing is to be deemed to be done in good faith, within the meaning of this Act, where it is in fact done honestly, whether it is done negligently or not."

"That section is obviously founded on the distinction pointed out in *Jones* v. *Gordon*[1], by Lord Blackburn, between the case of a person who was 'honestly blundering and careless', and the case of a person who has acted not honestly, that is, not necessarily with the intention to defraud, but not with an honest belief that the transaction was a valid one, and that he was dealing with a good bill."

"Sale of Goods Act, 1893: A thing is done "in good faith" when it is, in fact done honestly, whether it be done negligently or not."

Ballentine : Law Dictionary (U.S.A.)

"A statutory definition of the term is, an honest intention to abstain from taking any unconscientious advantage of another, even through the forms and technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious.

As applied to the holder of a forged check, to establish good faith there must not only be an absence of knowledge of any invalidity, but an absence of circumstances which would put an ordinarily prudent man upon inquiry.

As an element tending to rebut malice in libel and slander, good faith requires proper consideration for the character and reputation of the person whose character is likely to be injuriously affected by the publication. There must be absence, not only of all improper motives, but of negligence.

Good faith in adverse possession.—In the law of adverse possession, whether general or statute the term means free from a design to defraud those who appear to have a better title than the claimant's. His possession must be free from stealth.

Good faith in stock issue.—In the valuation of property for which stock in a corporation is issued, "good faith" consists in the belief that a prudent and sensible man would hold in the ordinary conduct of his own business affairs."

The Law Lexicon of British India by P. Ramanatha Iyer (M.L.J.).

"Good Faith" defined. Act XLV of 1860, section 52; Act IX of 1908, section 2 (7); Act X of 1897, section 3 (20); Bengal Act I of 1899, section 3 (17); Bombay Act I of 1904, section 3 (20). Burma Act I of 1898, section 2 (25) E.B. & A. Act I of 1909, section 5 (21); Madras Act I of 1891, section 3 (11); Punjab Act I of 1898, section 2 (22) ; U.P. Act 1 of 1904, section 4 (17).

Good Faith.—Honesty, absence of fraud, collusion or deceit.

Nothing is said to be done or believed in good faith which is done or believed without due care and attention. (Penal Code, section 52).

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1. (1877) L.R. 2 App. Cas. 616.

A thing shall be deemed to be done in "good faith" where it is in fact done honestly, whether it is done negligently or not. Act X of 1897 (General Claues) section 3 (20) ; Eng. Bill of Exchange Act, 1892, section 90.

Nothing shall be deemed to be done in good faith which is not done with due care and attention. Act IX of 1908. (Limitation) section 2 (7).

Under the definition of the term in the Limitation Act "nothing shall be deemed to be done in good faith which is not done with due care and attention". This is a stricter definition than the one adopted in section 3 (20) of the General Clauses Act, 1897, under which "a thing shall be deemed to be done in "good faith" where it is in fact done honestly ; whether it is done negligently or not". 13 I.C. 260. See also 1 Bom. 296 (Good faith and notice).

The words "good faith" have no technical legal signification, but are to be taken in their ordinary acceptation, and mean simply, honestly in belief, purpose, or conduct.. Cf. *Butcher* v. *Stead*[1]; In re *Avery*[2] Ex parte *Watson*[3].

Bearing these principles in mind, if we examine the facts of this case, the points which fall for consideration are three in number *viz.*, whether, when the cheroot tobacco had been pledged to the plaintiff bank, the defendant or its servants broke open the lock of the godown; secondly, whether the action of the Government in attaching the cheroot tobacco pledged to the plaintiff bank for the amount due on the beedi tobacco, is illegal and *male fide* ; and thirdly, whether by reason of any act or omission on the part of the Government servants negativing good faith, after the disposal of the claim petition preferred by the State in favour of the plaintiff bank, the defendant would be liable in damages. In all these points I have come to the same conclusion as both the Courts below and here are my reasons.

Point 1 : Both the Courts have found that the defendant or its servants did not break open the godown of Rahamatullah and remove the goods to Sundaram Pillai's godown and that what happened was that on the application of the surety Sundaram Pillai the Excise authorities permitted the transfer of the excisable goods which were slowly purloined from the godown of Rahamatullah, to the well-protected godown of Sundaram Pillai. Point 1 raised by the plaintiff bank rightly failed.

Point 2 : I have already reproduced rule 215 of the Central Excise Rules which states that the provisions of sections 168, 189 and 192 of the Sea Customs Act has to be applied *mutatis mutandis*. Therefore, for the words "custom house" we have to substitute the words "bonded warehouse". The cheroot tobacco was in the bonded warehouse of Sundaram Pillai. On the date when the Government attached the cheroot tobacco for the duty payable on the beedi tobacco, the Government was well within its rights to attach the same. The tobacco belonged to Rahamatullah but was in the custody of Sundaram Pillai and the Excise Department attached the tobacco. There is nothing illegal or unlawful in the conduct of the Excise Department. It has power under section 11 to attach the goods, *viz.*, the cheroot tobacco for duty due on other tobacco for which duty had not been paid by Rahamatullah. Section 11 completely gives power to the Government to take the action it did. Therefore the defendant is not liable either for the resultant deterioration or for the lesser price which the tobacco fetched in the Court sale. Point 2 also fails.

Point 3: Both the Courts below have found that first of all the order of the learned Subordinate Judge who disposed of the claim petition did not amount to an adjudication in regard to the Government's right to enforce the realization of the duty on the beedi tobacco by attaching the cheroot tobacco. The learned Subordinate Judge himself in paragraph 7 of his order (Exhibit A-11) states "Whether the pledge will affect the Government's right to claim duty or not is another matter". Again in paragraph 9 he states: " The next question is whether the petitioner gets any charge by virtue of the attachment effected under section 11 of the Act....That question does not however arise for consideration in this matter in view of my finding that the respondent bank has got a charge on the goods attached". Secondly, both the Courts below have found that after the dismissal of the claim petition the Department did not object to the plaintiff in any way proceeding against the attached tobacco and that the plaintiff completely failed to show that the Department unnecessarily

1. (1875) L.R. 7 H.L. 839.
2. (1887) L.R. 36 Ch.D. 307.
3. L.R. (1888) 21 Q.B.D. 301.

and improperly withheld the tobacco and that the detention of the goods was the direct cause of the alleged deterioration of the tobacco and its fetching a low price. Therefore, point 3 also rightly failed.

The plaintiff has throughout failed to show want of good faith on the part of the Excise Officials. It is not for the Union Government to establish its good faith but it is for the plaintiff bank to establish its want of good faith. On the failure of the plaintiff bank to establish want of good faith on the part of the Union Government, the two consequences follow, *viz.*, that the plaintiff bank is barred from filing this suit under section 40 (1) of the Central Excises and Salt Act, 1944, and that this suit instituted for an act done or ordered to be done, after the expiration of six months from the accrual of the cause of action or from the date of the act or order complained of, which has been the case here because the attachment was effected certainly long prior to six months of the date when the suit was instituted, would be barred by limitation under section 40 (2).

In the result, this second appeal is dismissed without costs.

No leave.

V.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

Employees of Caltex by Petroleum Workers' Union .. *Petitioner**

v.

Commissioner of Labour and Conciliation Officer and another .. *Respondents.*

Industrial Disputes Act (XIV of 1947), section 12—Conciliation proceedings under—What are—Conciliation arrived at before the Minister in charge after failure of conciliation before the Labour Officer—If within section 12—Proceedings under—If judicial or quasi-judicial subject to jurisdiction of Court under Article 226 of the Constitution.

Section 12 of the Industrial Disputes Act prescribes the procedure and time within which a Conciliation Officer under the Act could report a settlement arrived at in the course of conciliation proceedings. Where the Conciliation Officer reports failure of the parties to arrive at a settlement, but the matter is later dealt with by the Government or the Minister it is not a conciliation proceeding under the section and any settlement arrived at at that stage can only be a settlement arrived at otherwise than in the course of conciliation proceedings. Proceedings under section 12 can be conducted only by the Conciliation Officer and not by the Government or the Minister.

A Conciliation Officer acting under section 12 of the Act cannot be said to be acting in a judicial or quasi-judicial capacity. Though he hears the opposing parties and their disputes he is not competent to decide them. He can only persuade the parties to come to a fair and amicable settlement. Hence his orders are not subject to be corrected or quashed by the High Court under Article 226 of the Constitution.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavits filed therewith the High Court will be pleased to issue writ of *certiorari* calling for the records connected with the settlement reached under section 12 (3) of the Industrial Disputes Act, 1947, before the Commissioner of Labour and Conciliation Officer, Government of Madras, dated 16th October, 1958, between (i) the Management of Messrs. Caltex (India) Ltd., and (ii) the Management of Messrs. Standard Vacuum Oil Co., respectively and the Madras Kerosene Oil Workers' Union, Madras, and quash the same and to award costs of these petitions.

S. Mohan Kumaramangalam, K. V. Sankaran and *S. Ramaswami*, for the Petitioner in both the petitions.

The Additional Government Pleader (*K. Veeraswami*) on behalf of the 1st Respondent in both the petitions.

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* W.Ps. Nos. 914 and 915 of 1958. 24th February, 1959.
(5th Phalguna 1880, Saka).

A. B. Pai, for *Messrs. King & Partridge, S. Govind Swaminathan* and *S.S. Sivaprakasa*, for 2nd Respondent.

The Court made the following

ORDER.—Burmah-Shell, Caltex and Standard Vacuum are important distributors of mineral oil and mineral oil products in India. Prior to April, 1959, the employees of these concerns—or rather, the bulk of them—belonged to one or other of four Unions, *viz.*, the Burmah-Shell Oil Company's Union, the Caltex Oil Company's Union, the Standard-Vacuum Oil Company's Union and the Madras Kerosene Oil Workers' Union. Neither the Burmah-Shell Oil Company nor the Burmah-Shell Oil Company's Union figure in the present dispute. The Caltex Oil Company and the Standard Vacuum Oil Company have each two terminals or installations in the City of Madras. The Burmah-Shell Oil Company has also its terminals. The Madras Kerosene Oil Workers' Union includes in its membership the employees of all the three companies in their terminals in Madras. But, in these proceedings we are not concerned with the employees in the terminals of installations of the Burmah-Shell Oil Company in the City of Madras.

The Caltex Employees' Union had been recognised by the Caltex Oil Company subject to certain terms. One of these ran as follows :

"The Union excludes from its membership the Service and Labour Staff of the Company's Madras Terminals who are now represented by the Madras Kerosene Oil Workers' Union."

In or about April, 1958, the Caltex Employees' Union and the Standard Vacuum Oil Company's Union effected a merger and the amalgamated union was called the Petroleum Workers' Union. Up to the end of December, 1957, the conditions of employment in the Caltex Oil Company and the Standard Vacuum Oil Company were governed by certain agreements. These agreements lapsed on the last day of December, 1957. On 4th January, 1958, the Caltex Employees' Union wrote to the District Manager of Caltex (India) Ltd., enclosing a "charter of demands" and calling upon the Company to concede those demands. On 30th June, 1958, the Madras Kerosene Oil Workers' Union notified the management of the companies that they would go on strike at the end of 15 days. Thereupon the Commissioner of Labour, who is also the Concilation Officer appointed under the Industrial Disputes Act of 1947, called for a meeting between the representatives of the employers and employees. On 18th July, 1958, the Commissioner of Labour wrote to Government reporting what had happened at the meeting. His letter concluded as follows :

"Both parties have agreed to meet me on 31st July, 1958, for a further discussion of the matter. I shall send a further report to Government after meeting the parties on that date."

Copies of this letter were sent to the three companies and to the Madras Kerosene Oil Workers' Union, the Burmah-Shell Employees' Union and the Petroleum Workers Union. Further discussions took place on 31st July, 1958 and a report thereon was sent by the Conciliation Officer on 2nd August, 1958, to Government. In that letter he explained briefly what had happened at the meeting and ended it as follows:

"The managements declined to commit themselves to arbitration or to any interim payment of bonus. Mr. White wanted at least six weeks time to work out the details and put forth concrete proposals in the matter. The Union representatives stated that they could not accept the four months' bonus for 1957 as a final payment without knowing definitely the other proposals of the managements and that they could not also wait indefinitely in the matter. In the absence of any concrete proposals from the management, it has not been possible to bring about a settlement of the dispute."

According to the Petroleum Workers' Union, who are the petitioners before me this report of the Labour Commissioner and Conciliation Officer is a final report within the meaning of section 12 (4) of the Industrial Disputes Act.

On 12th August, 1958, the Additional Secretary to Government in the Department of Industries, Labour and Co-operation, wrote to the managements and the Unions stating that the Minister for Industries desired to discuss with them the question of bonus for the year 1957, and, requesting them to meet the Minister in his

chambers on the 14th. At the conclusion of the discussions held on the 14th, I now quote from the letter of the Additional Secretary to Government in the Department of Industries, Labour and Co-operation, dated 16th August, 1958.

"It was decided that the parties will conduct negotiations for a long term settlement in regard to wages, dearness allowance and other matters, that the negotations will commence early next week and that the negotiations will not exceed four weeks."

The letter ended :

"I am to request you to take further action accordingly and inform the Government of the results in due course."

On 12th September, 1958, the General Secretary of the Petroleum Workers' Union wrote to the District Manager of Caltex (India) Ltd., informing him that a meeting of the general body of the Union had been held that day and that at that meeting it had been resolved among other things to stop further negotiations with the managements. Copies of this letter were sent to, among others, the Manager of the Standard-Vacuum Oil Company, Madras, and to the Commissioner of Labour, Madras. On 17th September, 1958, the Petroleum Workers' Union also wrote to the Minister for Labour, Government of Madras, reporting that negotiations had failed. That letter ended with the request that the Minister would move the Government of India to urgently set up a National Tribunal. Commencing from 14th October, 1958, individual employees belonging to the petitioners' Union also sent letters protesting against negotiations. Nevertheless negotiations continued between the managements and the Madras Kerosene Oil Workers' Union, and, on 16th October, 1958, they reached a settlement, the terms of which appear in Exhibits E and E-1 annexed to Writ Petition No. 914 of 1958 and in Exhibits 8 and 9 annexed to the counter filed on behalf of Caltex (India) Ltd. The agreement was signed by the representatives of the Kerosene Oil Workers' Union and the representatives of Standard-Vacuum Oil Company (Exhibits E and E-1) and the representatives of Caltex (India) Ltd., (Exhibits 8 and 9). The Commissioner of Labour and Conciliation Officer, Government of Madras, has also put his signature below the memoranda of settlement. The Settlement expressly purports to be under section 12 (3) of the Industrial Disputes Act.

In pursuance of this settlement disbursements were made, and, in the counter-affidavit filed on behalf of Caltex (India) Ltd., it is stated that

"98 per cent. of the wokmen have accepted benefits under the bonus settlements in full and final settlement as per copy of receipts Exhibit 16 series."

In the affidavit filed on behalf of the Standard-Vacuum Oil Company it is stated:

"as a result of these settlement (sic) 130 workmen out of a total number of 197 covered by the settlement have accepted bonus agreed upon by them".

On 8th November, 1958, the Petroleum Workers' Union wrote to the managements of Caltex (India) Ltd., and Standard Vacuum Oil Company Ltd., protesting against the implementation of the settlement, dated 16th October, 1958. That Union, which was not a party to this settlement and which had, on 17th August, 1958, represented to the Minister for Labour that negotiations had failed, has filed these two petitions—one against Caltex (India) Ltd., and the other against the Standard Vacuum Oil Company—praying in each for the issue of an appropriate writ to call for the records connected with the settlement reached under section 12 (3) of the Industrial Disputes Act before the Conciliation Officer, Government of Madras, dated 16th October, 1958, and, to quash the same.

The arguments of Mr. Mohan Kumaramangalam the learned advocate for the petitioners, may be thus summarised. Section 18 of the Industrial Disputes Act deals with two kinds of settlements; (1) settlements arrived at by agreement between the employer and the workmen in the course of conciliation proceedings ; and (2) settlements arrived at between the employer and the workmen otherwise than in the course of conciliation proceedings. To settlements falling into the latter category the ordinary rule of law relating to contracts would apply and they would bind the parties thereto, their privies and their principals. But settlements arrived at between

employers and workmen in the course of conciliation proceedings bind others also. Sub-section (3) of section 18 makes it plain that such a settlement would bind not merely the parties to the industrial dispute, but, where a party to the dispute is composed of workmen it would bind

"all persons who were employed in the establishment or part of the establishment as the case may be to which the dispute relates on the date of the dispute and all persons who subsequently became employed in that establishment or part".

Now because the settlement reached between Caltex (India) Ltd., and the Standard Vacuum Oil Company and the Kerosene Oil Workers' Union on 16th October, 1958, is called a settlement under section 12 (3) of the Act, that is to say, a settlement arrived at in the course of conciliation proceedings and further, because that settlement is also signed by the Conciliation Officer it could be said that the terms of that settlement are binding on the members of the petitioner Union even though that Union was not a party to the settlement and had lodged its protest. It would not be right at all to call the settlement reached on 16th October, 1958, a settlement reached in the course of conciliation proceedings. In the first place sub-section (6) of section 12 requires that a report under that section shall be submitted within fourteen days of the commencement of the conciliation proceedings. The conciliation proceedings in the present case started on 14th July, 1958, when the Conciliation Officer sent out letters calling for a meeting. The fourteen days referred to in sub-section (6) ended long before 16th October, 1958. There is no doubt a proviso to sub-section (6) which says that the time for the submission of the report referred to in the sub-section may be extended. But then, that extension can be only by agreement in writing by all the parties to the dispute. There has been no agreement extending time in the present case.

No doubt sub-section (2) of section 9 enacts that no settlement arrived at in the course of a conciliation proceeding shall be invalid by reason only of the fact that such settlement was arrived at after the expiry of the period referred to in sub-section (6) of section 12. But then, in order that the benefit of this provision may be available, the conciliation proceedings must have continued and must not have collapsed. But, in the present case, they did not continue ; on the other hand the report which the Conciliation Officer sent on 2nd August, 1958, definitely shows that conciliation proceedings had failed. It is is not possible to read it as an intermediate report as suggested during the arguments because the Conciliation Officer did not say in it that he was still pursuing the matter and would submit a further report. In effect and substance that letter is a report within the meaning of section 12 (4) and it marks the termination of the conciliation proceedings. The settlement come to on 16th October, 1958, must therefore be regarded as a settlement come to otherwise than in the course of conciliation proceedings.

It is no doubt true that after the Conciliation Officer had sent his report the Minister for Labour took up the matter and tried to effect a settlement. He was of course entitled to do that. But, then the Minister is not a Conciliation Officer and any settlement come to as a result of his good offices would not be a settlement arrived at in the course of conciliation proceedings. There being no rule corresponding to the rule of *res judicata* which applies to civil actions the Conciliation Officer, could even after the failure of his first attempt start conciliation proceedings afresh. He could do that either *suo motu* or at the instance of the Minister, or, in fact of any one else. But the Conciliation Officer did no such thing in the present case. He did not call for any fresh meeting between the employees and the employers. The letter which the Additional Secretary to Government in the Department of Industries, Labour and Co-operation wrote to the Secretary of the petitioner Union can in no sense be regarded as initiating conciliation proceedings within the meaning of section 12. Proceedings under that section, as stated before, can be conducted only by the Conciliation Officer and not by the Minister or the Government. And, finally, there is the hard fact that the Petroleum Workers' Union was not a party to the settlement and had repudiated it as soon as it became aware of it.

There is considerable force in this line of reasoning. Learned counsel for the Companies invited me to treat the report which the Conciliation Officer sent on 2nd August, 1958, to the Government as an intermediate report; but I doubt whether I shall be justified in doing that because there is this explicit statement at the end of it:

"It has not been possible to bring about a settlement of the dispute".

The reasons and circumstances he set out in that letter do not alter the fact that he had reported failure. After this failure there had been no resumption of conciliation proceedings by the Conciliation Officer, and a settlement brought about owing to the intervention of other persons cannot be treated as a settlement arrived at in the course of conciliation proceedings within the meaning of the statute. The settlement in question cannot be regarded as a settlement under section 12 (3) of the Act.

This, however, is not sufficient to dispose of the matter. A writ of *certiorari* can issue only in relation to a judicial or quasi-judicial act and I am unable to persuade myself that when acting under section 12 of the Industrial Disputes Act a Conciliation Officer is acting in a judicial or quasi-judicial manner. No doubt there are opposing parties and various points at issue between them. But, the Conciliation Officer is not competent to hear or decide any of them. All he can do is to try to persuade the parties to come to a fair and amicable settlement. The Act gives him power to

"do all such things as he thinks fit for the purpose of inducing the parties to come to a fair and amicable settlement of the dispute."

His duties are to induce or persuade; he has no power to decide anything at all. He can appeal to their good sense or to their sense of partriotism or to their self-interest. Within reasonable limits he may also remonstrate with them. He may invite them to take into consideration the temper of public opinion or the hardships that the public may be put to. In fact, the matter is left entirely to his resourcefulness and power of persuasiveness. How the discharge of such duties can be regarded as judicial or quasi-judicial, it is hard to see.

Mr. Mohan Kumaramangalam referred me to the decision in *R.* v. *Manchester Legal Aid Committee*[1]. On pages 486 to 490 of the Report Parker, J., had examined the scope of a writ of *certiorari* and indicated how with the passage of time the ambit of the activities in relation to which the writ was being issued has been extended and how in *R.* v. *Postmaster-General Ex parte Carmichael*[2], the certificate of the chief medical officer of the office certifying that one Carmichael, a clerk, was not suffering from the telegraphist's cramp was quashed. If a writ could issue in a matter of that kind, said Mr. Kumaramangalam, a writ of *certiorari* can issue in the present case also. I do not however think that the present case can be approximated to that of *R.* v. *Postmaster-General Ex parte Carmichael*[2], because apart from everything else, as explained before, the duties of a Conciliation Officer under section 12 are not to decide but to persuade, or in the language of the section, to induce the parties to come to a settlement.

It is also difficult to see how the circumstances that the Conciliation Officer has signed at the foot of the agreement, and the agreement purports to be one under section 12 (3) of the Industrial Disputes Act can be regarded as any kind of order or decision. It is not therefore susceptible to correction by *certiorari.*

Mr. Mohan Kumaramangalam complained that by reason of the fact that the Conciliation Officer has appended his signature to the foot of the memorandum of settlement which purports to be under section 12 (3) of the Act the rights of the petitioner are prejudicially affected and that it would be claimed that the petitioner and the workmen whom the petitioner represents are bound by the terms of the settlement. Even so, how it becomes an order or decision I find it hard to see.

It will be appreciated that whatever may be the position of the petitioner in relation to the settlement, it does bind the employers and all the employees whom the

1. (1952) 1 A.E.R. 480. 2. L.R. (1928) 1 K.B. 291.

Madras Kerosene Oil Workers' Union represented or whom it was entitled to represent. As between them the agreement is good and valid and cannot be quashed. When the matter is fully considered it will be appreciated that what the petitioner really wants is a declaration that the settlement come to on 16th October, 1958, does not bind the petitioner. To get such a relief it must file a suit for a declaration. The jurisdiction of this Court in relation to writs cannot be availed of for that purpose.

There are still further difficulties in the way of the petitioner. Some employees working in the terminals of these Companies appear to belong both the Madras Kerosene Oil Workers' Union and the Petroleum Workers' Union. By virtue of being members of the Madras Kerosene Oil Workers' Union they will be bound by the settlement arrived at. How can they be relieved from that obligation because they happen to belong to the Petroleum Workers' Union? If it be suggested that the relief may be so limited as to make it available only to such members of the Petroleum Workers' Union as are not also members of the Madras Kerosene Oil Workers' Union the difficulty arises that a question of fact has to be investigated which cannot be done in writ proceedings. In this connection it is necessary to bear in mind that the Petroleum Workers' Union was formed by the merger of two other unions one of which was called the Caltex Employees' Union, and, this Union had been recognised by the Company subject to the distinct understanding that the Union would exclude from its membership the service and labour staff of the Company's Madras terminals who were represented by the Madras Kerosene Oil Workers' Union. An association which has been formed by the merger of other associations cannot get rid of the obligations fastening to the Unions which merged into it. An individual or association which has given an undertaking cannot shed the burden of that undertaking by merging itself into something else.

There is a yet further difficulty. The affidavit filed on behalf of the Caltex (India) Ltd., shows that 98 per cent. of the workmen have adopted the settlement reached on 16th October, 1958, and, likewise, the affidavit filed on behalf of the Standard Vacuum Oil Company shows that 130 workmen out of a total of 197 have adopted the settlement. Mr. Mohan Kumaramangalam explained that the workmen must have been induced somehow or other to accept the settlement. But, here I cannot investigate the question whether the workmen concerned were induced to accept the settlement by unfair or illegal methods. I can proceed only on the footing that they have accepted them. This will be another circumstance which, even if the writ were otherwise available to the petitioner, would justify the Court in refusing it.

Taking all the circumstances into account I must refuse the writs prayed for. The petitions are dismissed, but, in the circumstances of the case, without costs.

R.M. ——— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANCHAPAKESA AYYAR AND MR. JUSTICE BASHEER AHMED SAYEED.

KM.N.SP.N. Valliammai Achi .. *Appellant**

v.

J. A. Ramachandra Ayyar and others .. *Respondents.*

Madras Agriculturists' Relief Act (IV of 1938), sections 7 and 13—Suit on Mortgage against mortgagor and puisne mortgagee—Scaling down as against former, as agriculturist and decree passed for scaled down amount—Decree for full unscaled amount against puisne mortgagee—Puisne mortgagee obtaining decree on his mortgage—Assignee of latter decree executing it and purchasing property in execution sale—Right to claim full satisfaction and redemption on payment of scaled down decree amount.

Where in a suit instituted for the enforcement of a mortgage to which a puisne mortgagee is added as a party defendant, the Court passes a preliminary decree against the mortgagor agriculturist

* A.A.O. No. 260 of 1955. 3rd December, 1958.
(12th Agrahayana, 1880—Saka).

debtor for a specific amount after scaling down the debt, and a decree for the full amount as against the puisne mortgagee, as he is not an agriculturist, which decrees are subsequently made absolute it cannot be said as a matter of law that the moment the entire amount decreed due by the agriculturist-debtor is paid, the entire property stands redeemed and the liability for the difference due under the unscaled amount is also automatically wiped out on the ground merely that the mortgaged property is wholly owned by the agriculturist judgment-debtor. The puisne mortgagee or his assignee who purchases the mortgaged property in execution of a decree obtained by him on the basis of the puisne mortgage cannot, by depositing the amount declared as due by the agriculturist mortgagor, claim to have satisfied the entire decree amount and thus claim to have redeemed the entire property on the ground that he has become the representative of the mortgagor-agriculturist-debtor.

It is well settled that there can be two different decrees in one and the same suit as regards two different persons, *viz.*, an agriculturist and non-agriculturist—(mortgagor and puisne mortgagee (or his assignee) as in this case) and if the latter should become entitled to the entire property in his absolute right, he has to satisfy the entire decree amount and then only can he claim to have it declared that the entire decree has been satisfied, as he is liable to pay the full unscaled decree amount.

If in a suit on a mortgage against different mortgagors having different and separate interests in the same mortgaged property, some of them agriculturists and others non-agriculturists, a decree for the scaled down amount is passed against the agriculturists and a decree for the unscaled amount is passed against the non-agriculturists, the decree-holder is clearly entitled to execute the decree for the unscaled amount against the non-agriculturists. The fact that the entire property is owned by and vested in one man, the mortgagor agriculturist, and the other judgment-debtor non-agriculturist is not the owner but only a puisne mortgagee would make no difference and cannot be relied on by the latter as entitling him to claim full satisfaction of the decree by merely paying off the amount decreed as against the agriculturists-mortgagor judgment-debtor.

Ramaswami Ayyangar v. *Kailasa Thevar*, (1951) S.C.J. 278 : 1951 S.C.R. 292 : (1955) 1 M.L.J. 560 (S.C.), followed.

Subramaniam Chettiar v. *Ramachandra Reddiar*, (1946) 2 M.L.J. 429 and *Kailasa Thevar* v. *Ramaswami Ayyangar*, (1948) 2 M.L.J. 28, not followed.

Appeal against the Order of the Court of the Subordinate Judge of Madurai, dated 1st March, 1955 and made in E.P. No. 122 of 1953 in O.S. No. 210 of 1949.

R. Gopalaswami Ayyangar, for Appellant.

M. Natesan, for third Respondent.

The Court delivered the following Judgment :

Panchapakesa Ayyar, J.—This Civil Miscellaneous Appeal first came on for hearing before one of us (Basheer Ahmed Sayeed, J.). As it was represented before him that it involved a question of law of considerable importance not covered by any decision of this Court or any other High Court or Supreme Court till now, it was directed to be posted before a Bench. That is how it has come up before us for hearing and disposal.

The facts were briefly these : One Nachiappa Chettiar was the first mortgagee in respect of the suit properties worth some Rs. 35,000 from one Ramachandra Iyer the owner and mortgagor (Defendant 1). This Ramachandra Iyer had also executed a second mortgage by deposit of title deeds, operating as equitable mortgage for some Rs. 7,000 and odd in favour of Seth Dayaldas Hasanand (Defendant 2). The plaintiff, Valliammai Achi, the widow of Nachiappa Chettiar, obtained a preliminary decree in O.S. No. 210 of 1949 on the file of the Subordinate Judge of Madurai, against the mortgagor Ramachandra Iyer (Defendant 1), and the puisne mortgagee, Dayaldas Hasanand, (Defendent 2) for Rs. 20,409-14-0. It was an *ex parte* decree. That *ex parte* decree was set aside so far as the first defendant Ramachandra Iyer was concerned, and another preliminary decree was passed against him on 8th July, 1950, declaring the amount due by him under the mortgage as Rs. 17,822-4-0, as he was an agriculturist entitled to the benefits of the Madras Agriculturists Relief Act. But as regards the second defendant, Hasanand, who was not an agriculturist, the original decree for Rs. 20,409-14-0, passed on 21st February, 1950, stood. A final decree was passed on 27th January, 1951, on the lines of the two preliminary decrees, as no amount was paid by either the mortgagor or the puisne mortgagee. Valliammai Achi, the decree-holder, took out E.P. No. 122 of 1953 for recovering the amounts under the preliminary decrees by sale of the hypotheca. The second defendant had obtained a decree in O.S. No. 146 of 1947 on 22nd October, 1948, against the mortgagor Ramachandra Iyer for some Rs. 8,939, the amount due by then on the puisne mortgage. He had also made Nachiappa Chettiar a party to

that suit and had claimed priority over him. The Court had held that Nachiappa Chettiar's mortgage debt had priority over the equitable mortgage of Hasanand. It is after that Hasanand was made the second defendant in O.S. No. 210 of 1949, the suit filed by Valliammai Achi, the widow of Nachiappa Chettiar, and the two preliminary decrees resulted.

The second defendant, Hasanand, assigned his decree in O.S. No. 146 of 1947 in favour of the fourth defendant Soundarapandian Chettiar, the third respondent in this Civil Miscellaneous Appeal for Rs. 3 500. Bhaggyammal, the third defendant in O.S. No. 210 of 1949, was only a maintenance holder entitled also to a right of residence, and she has died since. This is why Soundarapandian Chettiar, the fourth defendant in O.S. No. 210 of 1949, has been promoted as the third respondent in this Civil Miscellaneous Appeal.

Soundarapandian Chettiar had taken the assignment of the decree of Hasanand the puisne mortgagee, for Rs. 3,500, and he had, in execution of that decree, purchased the entire suit property himself on 3rd July, 1953, for Rs. 12,000 and had set off against it the amount due under puisne mortgage which had come to that amount. Then, he paid Rs. 21,175-8-1 outside the Court to Valliammai Achi, the decree-holder in O.S. No. 210 of 1949, and completely satisfied the scaled down decree amount due by the mortgagor Ramachandra Iyer, defendant 1. He then wanted full satisfaction of the entire decree in O.S. No. 210 of 1949 in both its parts, scaled and unscaled, to be entered up.

The learned Subordinate Judge, after hearing the arguments on both sides, and considering the rulings cited by either side, came to the conclusion that full satisfaction should be entered in E.P. No. 122 of 1953, rejecting Valliammai Achi's contention that she had the right to recover the difference between the scaled and unscaled amounts, and that the E.P. should be dismissed. He allowed E.A. Nos. 641 and 703 of 1953, two petitions for entering full satisfaction filed by Soundarapandian Chettiar, the assignee of the puisnee mortgagee, subject to the unscaled amount, and the original mortgagor Ramachandra Iyer, against whom only a scaled down decree had been passed. He directed all the parties to bear their own costs, in the E.P. and the two E.As. evidently because the point was a new one not directly covered by any ruling so far.

Valliammai Achi has felt highly aggrieved and has filed this Civil Miscellaneous Appeal.

We have perused the entire records and heard the learned counsel on both sides. Mr. R. Gopalaswami Ayyangar, the learned counsel for Valliammai Achi, and Mr. Natesan, the learned counsel for Soundarapandian Chetttiar the assignee from the puisne mortgagee, have argued the case fully and fairly. There is no dispute by Mr. R. Gopalaswami Ayyangar that full satisfaction was rightly entered in E.A. No. 703 of 1953 filed by the mortgagor Ramachandra Iyer, as the entire scaled down amount due by that individual had been paid by Soundarapandian Chettiar. The contest by Mr. Gopalaswami Ayyangar centred round the full satisfaction entered in E.A. No. 641 of 1953, filed by Soundarapandian Chettiar, the assignee from the puisne mortgagee, who was liable to pay the unscaled amount. Mr. Gopalaswami Ayyangar urged that it was unheard of to enter full satisfaction regarding this unscaled decree when admittedly the difference between Rs. 20, 409-14-0, covered by the unscaled amount, and Rs. 17,822-4 0, covered by the scaled down amount, had not been paid. When we asked Mr. Natesan under what law or rule he claimed full satisfaction to be entered when there had been no satisfaction regarding this amount covered by the difference, he said that, *as a matter of fact*, the difference had not been paid, but, *as a matter of law*, it must be deemed to have been wiped out. According to him, when a decree is passed by a Court for the scaled down amount against an agriculturist judgment-debtor, and for the unscaled down amount against the non-agriculturist judgment debtor, but the *property is wholly owned by the agriculturist judgment debtor*, the moment the entire amount due by the agriculturist judgment-debtor is paid, the entire property stands redeemed, and the liability for the difference due under the unscaled amount is automatically wiped out. He relied for this

extraordinary proposition on a ruling of a Bench of this Court in *Subrahmaniam Chettiar* v. *Ramachandra Reddiar*[1]; Mr. Gopalaswami Ayyangar pointed out, quite rightly that this ruling went on the basis of an old line of cases which ended with the Bench ruling in *Kailasa Thevar* v. *Ramaswami Ayyangar*[2], which was reversed by the Supreme Court on appeal in *Ramaswami Ayyangar* v. *Kailasa Thevar*[3]. Mr. Natesan ingeniously argued that the Supreme Court case could be distinguished from the present case. According to him, if, in the same property, different mortgagors have got *different, and separable interests*, and some of them are agriculturists and some of them are non-agriculturists, and a decree for the scaled down amount is passed against the agriculturists and for the unscaled amounts against the non-agriculturists, then the decree-holder can execute the decree for the s aled-down amount against the agriculturists, and for the unscaled amount against the non-agriculturists, but that, in a case like this, where the *entire ownership vested in one man, Ramachandra Iyer*, that rule would not apply, and the difference between the unscaled and scaled amounts would be wiped out the moment the scaled down amount was paid by the owner, the mortgagor. To illustrate the point more clearly, this is what he says. Suppose a house is owned by five brothers, one of whom is a Judge paying income-tax, disqualifying him from the benefit of the Madras Agriculturists Relief Act, another is a trader paying sales-tax, disqualifying him from the benefit of the Madras Agriculturists Relief Act, the third is a house owner paying property-tax, disqualifying him from the benefit of the Madras Agriculturists Relief Act, the fourth is an agriculturists entitled to the benefit of the Madras Agriculturists Relief Act, and the last is an unemployed man not entitled to the benefit of the Madras Agriculturists Relief Act then a decree for the scaled down amount will be passed against the fourth and a decree for the unscaled amount will be passed against the other four and the agriculturist judgment-debtor can get his 1/5th interest freed from the liability on payment of the scaled down amount; but the other four can get their 1/5th interest each freed only by paying the unscaled amount. But, Mr. Natesan said that this is only confined to this peculiar set of circumstances, and that it will not apply to a case, like ours, where the entire property is owned by the agriculturist judgment-debtor and the non-agriculturist judgment-debtor is only a puisne mortgagee against whom the original mortgagee could not proceed personally, or even bring a suit for redemption. He relied for this position on a Bench decision of the Calcutta High Court in *Sailendranath Battacharya* v. *Amarendranath Mukherjee*[4] and the following passage at page 525:

> "A puisnee mortgagee is not under any obligation to redeem the prior mortgage deed. Ordinarily, he redeems to safeguard his own interest in the mortgaged premises. The law confers, so to say, a privilege on him which he may exercise for his own protection by conferring on him a right to redeem the prior encumbrance in a case where he apprehends squeezing out by the prior mortgagee."

No doubt, he is right in urging that proposition of law. But it will not help him in any way regarding this case. Here, the mortgagee, Valliammai Achi, had got a decree not only against the mortgagor Ramachandra Iyer but also against the puisne mortgagee Hasanand, the assignor of Soundarapandian Chettiar. Soundarapandian Chettiar, therefore, after this purchase in execution of the decree in O.S. No. 146 of 1947, subsequent to getting the assignment from Hasanand, stood in the shoes of both Ramachandra Iyer, the mortgagor and owner of the properties, and Hasanand, the puisne mortgagee. Every mortgagee, including a puisne mortgagee, *has an interest in property*. Soundarapandian Chettiar standing in one shoe of Ramachandra Iyer and in another shoe of Hasanand, and entitled to the rights of both, also rendered himself, liable regarding the *liabilities* of both. Of course, Mr. Natesan is right in saying tht the first mortgagee's right in *only against the property*, and will cease to exist *the moment the property is exhausted*. But here the property is not exhausted. It is very much in existence. It is worth, as already stated, some Rs. 35,000 and Soundarapandian Chettiar had paid only Rs. 21,175-8-1 to Valliammai Achi for extinguishing the liability of Ramachandra Iyer under the scaled down decree. He

1. (1946) 2 M.L.J. 429.
2. (1948) 2 M.L.J. 28.
3. (1951) 1 M.L.J. 563 : (1951) S.C.J. 278 : 1951 S.C.R. 292 (S.C.).
4. I.L.R. (1941) 1 Cal. 514.

had also paid Rs. 3,500 for getting the assignment of Hasanand. In all, therefore, he has paid Rs. 24,675-8-1. By proceeding against the properties, the mortgagee Valliammai Achi can therefore easily recover Rs. 10,000 and odd, whereas, under the law, she had only to recover the difference between Rs. 20,409-14-0 and Rs. 17,822-4-0 or Rs. 2,587. 62 nPs. (in this case, we are not allowing interest thereon). It is obvious that she can easily recover this amount by proceeding against the property in Soundarapandian Chettiar's hands.

Then Mr. Natesan urged that if there were no puisne mortgagee at all, or if there had been no decree against the puisne mortgagee, and there was only a decree against the mortgagor Ramachandra Iyer, the entire property would have been freed from encumbrance, and Valliammai Achi left remedyless the moment Rs. 21,175-8-1 due by Ramachandra Iyer under the scaled down decree was paid. That is so. But it will not help Soundarapandian Chettiar in this case. The might-have-beens of history are objects of interesting speculation for the theorist, but, of no use for Courts and others dealing with *practical things*. Again, the same thing applies to Mr. Natesan's contention that if a non-agriculturist had bought the interest of the agriculturist judgment-debtor, Ramachandra Iyer, had he been the sole judgment-debtor, Valliammai Achi could not recover anything more than the scaled down amount, and the moment it was paid, she would be left remedyless. We need not go into other such cases of might-have-beens adduced by Mr. Natesan with a great deal of resource and ingenuity.

Finally, Mr. Natesan urged that it will be against all law and equity to make the same person, Soundarapandian Chettiar, not liable in *one capacity*, as the purchaser of the mortgagor's interest in the property, liable in another capacity, as the assignee from the puisne mortgagee. We see nothing contrary to justice or equity in this. Thus, a mere maternal uncle will not be liable to pay maintenance to his niece. In that capacity, the Hindu Law and other civilised laws make him completely exempt. But the moment he *marries the niece*, in his other capacity, as the husband of the woman, he will be made to pay maintenance under all the civilised laws. Again, the example given already of five persons interested in the house equally being liable for different amounts under the same mortgage, will show that the simple theory of Mr. Natesan will not hold good in these days of complex civilisation and complicated laws. Every day, Courts are passing scaled down and unscaled down decrees against different judgment-debtors. All that is not mere waste of effort.

So, we are satisfied that the dismissal of E.P. No. 122 of 1953 by the lower Court was wrong, as also the full satisfaction entered in E.A. No. 641 of 1953, filed by Soundarapandian Chettiar, the person liable for the unscaled decree amount as the assignee of the puisne mortgagee.

Then the question is how much this Soundarapandian Chettiar will have to deposit to have full satisfaction entered as regards the unscaled amount. Mr. Natesan frankly confessed that there is no question of limitation or other thing enuring to the benefit of Soundarapandian Chettiar entitling him to resist the enforcement of the difference between the scaled down amount and unscaled down amount, and that the only question now is whether the difference has been wiped out by law, and, if not, what he ought to pay to get full satisfaction entered. Mr. Gopalaswami Ayyangar urged that not only the difference of Rs. 2,587. 62 nP. has to be paid by Soundarapandian Chettiar to Valliammai Achi for getting full satisfaction entered regarding the unscaled amount and the decree passed against the puisne mortgagee, Hasanand, but *also interest* on that amount at 6 per cent. per annum, or, at least, 3 per cent. per annum, from the date of the decree till to-day. We cannot agree. As already stated, *the puisne mortgagee* could not have been proceeded against for the debt personally, or even forced to redeem. In the peculiar circumstances, and seeing that the law has been clarified only now, we see no reason to allow any interest till to-day on the debt of Rs. 2,587. 62 nP., but direct interest at 6 per cent. per annum on that amount to run *from to-day*, when we have settled the point of law and determined the amount due, till the date of realisation. Once this amount with interest from to-day is paid by Soundarapandian Chettiar to Valliammai Achi either directly, or by deposit in the lower Court, he will be entitled to have full satisfaction entered

regarding the unscaled decree amount passed against his assignor Hasanand and to have the property freed from all rights of Valliammai Achi.

In the circumstances, we direct all the parties to this Civil Miscellaneous Appeal to bear their own costs.

Basheer Ahmed Sayeed, J.—I entirely agree with my learned brother. On the facts of this case, I do not think there could be any other decision than the one which we have come to in this appeal.

The mortgage decree obtained by the decree-holder Valliammai Achi in O.S. No. 210 of 1949 clearly provided for payment of a sum of Rs. 17,822-4-0 by the first defendant, an agriculturist, who was the mortgagor. It also provided for the payment of a sum of Rs. 20,409-14-0 by the second defendant, who was the puisne mortgagee, and a non-agriculturist. The third defendant was declared to have a right of residence in the property. The present fourth defendant, who was added and later, became the purchaser of the property, mortgaged to the decree-holder, in execution of the decree obtained by the second defendant, the puisne mortgagee, in O.S. No. 146 of 1947. After the purchase of the property in Court-auction in execution of the said decree, the fourth defendant also became an assignee of the interest of the puisne mortgagee, the second defendant, in the mortgaged property. Therefore, the fourth defendant, who is the contesting respondent in this appeal, assumed for himself two roles : (1) as a purchaser of the mortgaged property in execution of a decree obtained by the puisne mortgagee ; and (2) the assignee of the interest of the puisne mortgagee in the property. When the fourth defendant became the purchaser in Court auction, if he had not also been the assignee of the second judgment-debtor in the original decree in O.S. No. 210 of 1949, surely, he would have stood on a different footing from the present position which he now occupies. By virtue of the transfer by assignment of the puisne mortgagee's interests, against whom there was a decree for the sum of Rs. 20,408-14-0, the fourth defendant also became liable to pay whatever the second defendant had to pay under the decree in O.S. No. 210 of 1949. The mere fact that he had purchased the interests of the puisne mortgagee in Court auction and had also got himself assigned the interest of the puisne mortgagee by paying a further sum of Rs. 3,500 it cannot be said that by his depositing of the amount due and payable by the first defendant under the decree, he would get an absolute and free title to the property purchased by him. He would be entitled to an absolute right free from all encumbrance to the property purchased by him only if and when the claim of the decree-holder in O.S. No. 210 of 1949 was entirely wiped out. As already observed by my learned brother Mr. Natesan appearing for the contesting respondent, fourth defendant has not been able to show how exactly the balance of the claim of the decree-holder under the decree in O.S. No. 210 of 1949 has been wiped out. Unless and until this claim for the balance was liquidated by methods known to law, the auction-purchaser cannot claim satisfaction of the entire decree in O.S. No. 210 of 1949. That is a sum of Rs. 2,587. 62 nP. and unless and until that sum was paid, the decree in O.S. No. 210 of 1949 could not be said to have been satisfied. For satisfaction of that decree, the fourth defendant cannot but have to deposit that sum. The Supreme Court ruling, relied on by the learned counsel for the appellant, did make it clear that there could be two different decrees in favour of two different persons, *viz.*, an agriculturist and a non-agriculturists, and the decree in O.S. No.210 of 1949 exactly provided for two different decrees representing the interests of two different persons in the property. That being the case, and it being conceded that this contesting respondent, the fourth defendant, has become the assignee of the interests of the second defendant in the mortgage while he was already a judgment-debtor in the sum of Rs. 20,409-14-0 if this fourth defendant had paid Rs. 17,822-4-0 together with interest accrued thereon, all that he would be entitled to would be that he has acquired the interests of the puisne mortgagee in the property subject only to the prior mortgage. But, at the same time, it cannot be contended that he had cleared off the right and claim of the decree-holder which he had as against the assignor of the fourth defendant. The liability

of the assignor cannot be said to have been wiped out by the mere fact that the fourth defendant as purchaser and as assignee of the second defendant paid the sum that was due and payable to the decree-holder by the agriculturists mortgagor, the first defendant. Therefore, it is obvious that as long as the decree subsisted without being satisfied at least to the extent of Rs. 2,587-62 nP. payable by the second defendant, the puisne mortgagee, into whose footsteps the fourth defendant has come, the claim of the fourth defendant to have it declared that the entire decree has been satisfied cannot be valid and sustainable. The learned Judge was in error in having allowed the satisfaction of the decree for the entire amount by reason of the payment of Rs. 21,175-8-1 by the fourth defendant, which represented only the amount that was decreed against the mortgagor, the first defendant and not the amount that was decreed against the second defendant, the puisne mortgagee.

Therefore, in order that the contesting respondent should become entitled to the entire property in his absolute right, he has to satisfy the decree that is still subsisting, in respect of which E.P. No. 122 of 1953 has been filed. The direction therefore, that my learned brother has given that he should bring to Court the balance of Rs. 25,87-62 nP. is the only direction that we can think of in the circumstances of this case, and especially in view of the fact that the fourth defendant had entered into a double role, one, the assignee of the puisne mortgagee, who was himself the judgment-debtor, and the other, the purchaser of the interests of that puisne mortgagee in Court-auction in O.S. No. 146 of 1947. The other directions of my learned brother are justified by the circumstances of this case and I have nothing further to add to them.

P.R.N. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GANAPATIA PILLAI.

P. S.V. R. M. Ramanatha Ayyar .. *Appellant**

v.

M. Pappu Reddiar .. *Respondent.*

Civil Procedure Code (V of 1908), section 144—Restitution under—Decree for money—Money deposited in Court—Decree varied in appeal—Restitution proceedings by judgment-debtor—If could claim interest on the money deposited.

The restitution contemplated under section 144, Civil Procedure Code, is the restoration to the injured party of what he had lost and not the deprivation of the other party of what he had wrongfully gained. Where in pursuance of a decree money was deposited into Court as a condition for stay of execution and subsequently the decree was varied it is open to the aggrieved party to claim interest on the money deposited, by way of restitution. The fact that the other party did not withdraw the amount deposited into Court because of the judgment-debtor insisting on the security, makes no difference to the principle.

Shanmugasundara Mudaliar v. *Ratnavelu Mudaliar,* (1932) 63 M.L.J. 383 : I.L.R. 55 Mad 1025, followed.

Appeal against the order of the Court of the Subordinate Judge of Tirunelveli dated 6th April, 1956 and made in E.A. No. 84 of 1956 in O.S. No. 98 of 1949.

T. P. Gopalakrishnan, for Appellant.

K. S. Desikan and *K. Raman,* for Respondent.

The Court delivered the following

JUDGMENT.—This appeal is preferred by the defendant petitioner in E.A. No. 84 of 1956 in O.S. No. 98 of 1949 on the file of the Court of Subordinate Judge, Tirunelveli. That was an application made by the defendant in the suit for restitution under section 144, Civil Procedure Code.

The facts of the case are : One Muthuswami Reddiar filed O.S. No. 98 of 1949, against the present appellant in the Court of the Subordinate Judge, Tirunelveli

* A.A.O. No. 32 of 1957.

5th February, 1959.
(16th Magha 1880 Saka).

for recovery of a large sum of money and obtained a decree for about Rs. 10,000 odd and Rs. 1,400 for costs against the appellant. The appellant preferred an appeal against that decree to this Court in A.S. No. 121 of 1951. Pending appeal, he applied for stay of execution and this Court ordered the entire decree amount to be deposited into Court as a condition of the stay, and further ordered that the decree amount could be withdrawn by the decree-holder on his furnishing security of immoveable property. In pursuance of the order of this Court, the judgment-debtor, the appellant before me, deposited the entire decree amount into the lower Court he having paid the costs of suit to the decree-holder. But the decree-holder never furnished security as directed in the order of this Court and consequently never withdrew the amount which was lying in Court. Ultimately, the appeal, A.S. No. 121 of 1951, succeeded and the liability of the appellant was reduced to Rs. 562-12-0 for the plaint claim and Rs. 108-9-5 for costs, in the place of Rs. 10,000 odd and Rs. 1,400 odd granted by the lower Court. After this decision of the appeal, the judgment-debtor applied to the lower Court in E.A. No. 84 of 1956 for restitution, after giving credit to the sum of Rs. 108-9-5, which he was liable to pay as costs of the suit.

In these proceedings, he claimed a sum of Rs. 1,365-0-7 on account of the excess costs paid to the decree-holder as per the decree of the first Court. He also claimed Rs. 10,962-2-0 deposited in pursuance of the order of this Court in the stay application. He further claimed interest on both these amounts at 6 per cent. per annum. The learned Subordinate Judge directed restitution by passing an order calling upon the legal representative of the original plaintiff, who had died in the meanwhile, to pay back the amount of costs claimed, together with interest at 6 per cent. per annum. But, in respect of the plaint claim, the learned Judge refused to give interest claimed, on the ground that the decree-holder had not withdrawn the amount from Court and the money was always lying in Court till the appeal was disposed of.

Mr. Gopalakrishnan, learned counsel for the appellant, relies upon the Bench ruling in *Shanmughasundara Mudaliar* v. *Ratnavelu Mudaliar*[1], where the same question arose for decision. That Bench ruled that restitution contemplated under section 144, Civil Procedure Code, was the restoration to the injured party of what he had lost and not the deprivation of the other party of what he had wrongfully gained. The reason behind this principle is that the object of restitution is to put back the wronged party into the position in which he would have been but for the wrong decree or order which was afterwards reversed and not to compel the party, who was benefited by the wrong decree, to return any benefit which he had gained by that decree. This decision is on all fours with the facts of the case before me and I am bound to follow it. Mr. Desikan attempted to distinguish this decision by saying that the inability of the decree-holder to withdraw the money in Court was due to a positive act on the part of the judgment-debtor in insisting upon security being given for the money before it could be withdrawn. That condition was imposed by the order of this Court, no doubt, at the request of the judgment-debtor when he preferred the application for stay of execution. This circumstance is not noticed in the decision mentioned above. But I am unable to see how it makes any difference. If the true test, as laid down in the decision, was that the object of restitution is to compensate an injured party and not to deprive a party, who had benefited by the wrong decree, of the benefit that he had received, it makes no difference whether the money was allowed to lie in deposit either because by the terms of the order granting stay security had to be given or even because the decree-holder did not care to withdraw the money, even though there was no obstacle in his way to doing so.

Mr. Desikan referred me to the decision in *South Indian Railway Company, Ltd.* v. *Mayilvahanan*[2]. There a decree was obtained against the South Indian Railway for a certain sum of money and an appeal was preferred by the Railway Company

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1. (1932) 63 M.L.J. 383 : I.L.R. 55 Mad. 1025.
2. (1942) 2 M.L.J. 803.

against that decree. An order for stay of execution was obtained in appeal by which the decree amount was directed to be deposited in the trial Court and the plaintiff was permitted to withdraw it on giving security. The company accordingly deposited the amount and since the decree-holder was a minor, it insisted, in accordance with the terms both of the provisions of the Civil Procedure Code relating thereto and of the order granting stay, that the decree-holder should not draw the amount without giving security. The next friend of the minor was unable to furnish the required security and, therefore, the money was not drawn. Ultimately, the appeal preferred by the Railway Company failed and the decree-holder applied for payment of the amount and in addition, claimed interest on the amount for the period between the date of deposit and the date of payment to him. A Bench consisting of King and Kunhiraman, JJ., disallowed this claim for interest on the ground that in any event the amount could not have been withdrawn by the decree-holder without giving security because the decree-holder was a minor. That was not a case of restitution involving the application of the rule embodied in section 144, Civil Procedure Code. That decision has, therefore, no application to this case.

Following the decision in *Shanmughasundara Mudaliar* v. *Ratnavelu Mudaliar*[1], I hold that the learned Subordinate Judge was wrong in refusing to award interest claimed in the application for restitution. The appeal is allowed. There will be an order in terms of the prayer in E.A. No. 84 of 1956 with costs. The appellant will be entitled to costs of the appeal here.

R.M. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BASHEER AHMED SAYEED.

Balakrishna Koundar .. *Petitioner**

v.

Amirthavalli Ammal and another .. *Respondents.*

Civil Procedure Code (V of 1908), *Order* 21, *rule* 89 (*as amended in Madras*)—"*Person holding an interest*"—*Execution sale—Judgment-debtor not heard of for four or five years—Application by wife to set aside sale by making deposit of decree amount and five per cent.—Maintainability—Failure to prove that husband has not been heard of for seven years—Right to apply—*" *Person deriving title from judgment-debtor—Evidence Act* (*I of* 1872), *sections* 107 *and* 108—*Burden of proof.*

A Hindu wife who is in sole possession and enjoyment of the property of her husband who has not been heard of for about four or five years, there being no others who would be his heirs if he were dead, is a person holding an interest in the property within the meaning of Order 21, rule 89, Civil Procedure Code, as amended in Madras. She is certainly interested in seeing that the property is not alienated or otherwise transferred, and is entitled to save the property by applying under Order 21, rule 89, Civil Procedure Code, making the necessary deposit required by that rule, when it has been sold in execution of a decree of a creditor, in the absence of her husband.

Mollaya Padayachi v. *Krishnaswami Iyer*, (1924) 47 M.L.J. 622; *Potti Naicker* v. *Suppammal*, (1922) 20 L.W. 31; *Mammu* v. *Vinayaka Kamath*, (1951) 1 M.L.J. 420: A.I.R. 1951 Mad. 816 and *Kammiruddin Khan* v. *Sachidananda Jena*, A.I.R. 1948 Pat. 66, followed.

Where there is no proof that the husband has not been heard of for seven years, he cannot be presumed to be dead and his wife who fails to discharge the burden of proving that he has not been heard of for seven years, as required by sections 107 and 108, Evidence Act, cannot claim to have any interest "*in praesenti*" in his property as his widow, as a "person deriving title from the judgment-debtor."

Petition under section 25 of Act IX of 1887 praying the High Court to revise the Order of the District Court of South Arcot at Cuddalore, dated 19th July, 1957 and made in C.M.A. No. 15 of 1957, M.P. No. 1136 of 1956 in S.C. No. 964 of 1952, District Munsif's Court, Tindivanam.

P. Veeraraghavan for *M. S. Venkatarama Ayyar*, for Petitioner.

K. Desikachari, for Respondent.

The Court delivered the following

JUDGMENT.—Two points arise in this Civil Revision Petition for consideration. The first is, whether the respondent, who happen to be the appellant in the lower

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1. (1932) 63 M.L.J. 383 : I.L.R. 55 Mad 1025.

* C.R.P. No. 1424 of 1957. 10th February, 1959. (21st Magha, 1880—Saka.)

Court, has proved herself to be still a wife or a widow. The question of her being a wife or a widow will turn upon the fact as to whether there is satisfactory proof of the death of her husband. It is common ground that the husband has not been heard of for the last four or five years. Under sections 107 and 108 of the Evidence Act the burden is on the person who asserts that the man is dead or alive to prove that he is dead or alive as required by the sections. In this case on the evidence it is difficult to hold that the respondent has become a widow. The evidence is not satisfactory on that aspect of the case. There is no proof that the husband has not been heard of for seven years by those, who would have naturally heard of him if he were alive. It has, therefore, to be held that the respondent has not discharged the burden that lay on her to prove that the husband was dead in order to enable her to attain to the position of a widow. If she was a widow, then certainly the second question would be easily answered in her favour, namely that as a widow she has an interest '*in praesenti*' in the property of the husband, which she is seeking to save by payment of the auction price and the 5 per cent. solatium to the decree-holder, who has brought the property to sale in execution of his decree. She has, therefore, at present no interest in the property as a widow. She has not yet " derived any title to the property " as such widow in the absence of clear proof that her husband is dead.

The second question that arises for consideration is whether the respondent could be brought within the scope or Order 21, rule 89, clause (1), Civil Procedure Code. This rule says that where immoveable property has been sold in execution of a decree the judgment-debtor or any person deriving title from the judgment-debtor or any person holding an interest in the property may apply to have the sale set aside on his depositing in Court and so forth. The point then is as to whether the wife, who has not yet become a widow, can be said to be holding an interest in the property of the husband. The fact that the wife would be entitled to maintenance from the husband does not depend really upon the question whether the husband has property. Whether the husband has or has not any property, there is an obligation on the husband to maintain his wife. Therefore, it is clear that the right to maintenance by the husband does not always depend upon the husband holding any property. Irrespective of the husband holding any property, the wife will have always the right of being maintained by the husband as long as she continues to be his lawful wife. But the real point is whether being such a wife of the husband, whose property has been sold away in auction, she has not got that much of interest in the property in order to get the property saved and rescued from the clutches of a decree-holder, who has got it sold away in execution. If, however, it turns out to be the case that the husband is at sometime later dead, then certainly his wife would be justified in making every attempt to rescue the property by payment of the sale price plus the 5 per cent. solatium to the decree-holder. If the sale gets confirmed and the property passes into the hands of any purchaser and it ultimately turns out to be that the husband was dead, certainly it would be too late for the widow to retrieve the position. From this aspect of the case there seems to be some force in the contention that in circumstances like the present the wife could be held to hold an interest in the property belonging to her husband.

The learned counsel has invited my attention to *Mollaya Padayachi* v. *Krishnaswami Iyer*[1], in this connection. A Bench of this Court consisting of Spencer and Kumaraswami Sastri, JJ., has held that the son of a Hindu father would be having sufficient interest in the preservation of the property, which belonged to the father in his own right, as his self-acquired property, and that such interest of the son would be as the reversionary heir of the father, and that as such reversionary heir his son would be entitled under section 91 of the Transfer of Property Act to redeem the property or to apply to have the Court sale set aside under Order 21, rule 89, Civil Procedure Code. If, according to this decision, the son of a Hindu father could be treated as a reversionary heir of the father in respect of his separate or self-acquired property for purposes of asking for a sale being set aside, then certainly the wife of

1. (1924) 47 M.L.J. 622 at 640.

a husband, who has left property behind, could also be considered to be interestec in the property, because, if the husband turns out to be dead, certainly she woulc become entitled to the property under the present case. That being the case I think that it would not be a violation of the language contained in rule 89 o Order 21 to say that the wife would be a person holding an interest in the property of her husband.

Another decision relied upon by the learned counsel for the respondents is the one reported in *Mammu* v. *Vinayaka Kamath*[1]. Govinda Menon, J., who ha delivered the judgment, has observed that the substitution of the phrase, 'holding an interest therein by virtue of a title acquired before such sale' in Order 21, rule 89 by the phrase 'holding any interest' is intended to give a more beneficient anc wider right than was contemplated before. He further held that a person, who ha attached property, has certainly got interest in seeing that the property is not alie nated or otherwise transformed. On the analogy of this ruling, it would seem to be fair that the wife, who is getting an ultimate interest in the property held by the husband, would be entitled to save that property by complying with the require ments of Order 21, rule 89, Civil Procedure Code, when once it has been solc away in execution of the decree of a decree-holder. In *Potti Naicker* v. *Suppammal*[2] a Bench of this Court consisting of Oldfield and Venkatasubba Rao, JJ., has helc that a person, who has been in possession of properties sold in a Court-auction, prio to the execution sale, though his possession is that of a trespasser, is a person 'holding an interest' in the property sold, 'by virtue of a title acquired before such sale', withir the meaning of the words in Order 21, rule 89 of the Civil Procedure Code and i therefore entitled to apply for setting aside the sale on making the deposit unde the rule. This decision is, of course, on the language of the rule as it existed before the amendment. But, as has been observed by Govinda Menon, J., in *Mammu* v *Vinayaka Kamath*[1], if the amendment was intended to give a more beneficient anc wider right than was contemplated by the rule before it was amended, then certainly it stands to reason that the amended rule should be interpreted in a more libera manner than what could have been the case before the amendment.

Another decision, which has been cited by the learned counsel for the respon dent, seems to be also in accord with what has been held by the previous decisions The said decision is reported in *Kamiruddin Khan* v. *Sachidananda Jena*[3]. In tha decision Beover, J., has held that under Mitakshara School of Hindu Law a wife though she could not herself demand a partition, was entitled to receive a share equal to that of a son, if a partition took place between her husband and his sons and that that showed that the wife had a certain interest in the property, even i it might be regarded as a contingent interest, and that therefore the wife could apply and make a deposit under Order 21, rule 89. This decision seems to be in poin to the facts that arise in the present case. Admittedly there are no other heir to the husband's property, which is sold under the decree, excepting the wife. I is also not disputed that in all probability the wife is continuing in possession of the property and receiving the benefit therefor in the absence of the husband. O course, no evidence has been let in on this point but it has to be presumed that during the absence of the husband no other person could have been in possession and enjoy ment of the property sold under the decree excepting the wife herself. Therefore even from this aspect of the case the wife could be a person holding an interest in the property of the husband, which has been sold by the decree-holder.

On a consideration of these aspects of the case I am inclined to hold that the wife situated, as she is, will be a person holding an interest in the property under the amended rule 89 of Order 21, Civil Procedure Code and that she is entitled to have the sale set aside on her depositing in Court the purchase money as well as the per cent. solatium. In my opinion, the learned District Judge was correct whei he came to the conclusion that the wife could be a person, who could be said t

1. (1951) 1 M.L.J. 420 : A.I.R. 1951 Mad. 816.
2. (1922) 20 L.W. 31.
3. A.I.R. 1948 Pat. 66.

have an interest under Order 21, rule 89. I do not think that there is any justification, therefore, for me to interfere with the order of the learned District Judge in revision. The petition is, therefore, dismissed but in the circumstances without costs.

P.R.N. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE BALAKRISHNA AYYAR.

K. Simrathmull .. *Petitioner**

v.

The Additional Income-tax Officer, Ootacamund .. *Respondent.*

Income-tax Act (XI of 1922), section 34—Scope of—Assessment of escaped income—Procedure and limitation.

Section 34 of the Income-tax Act is intended to deal with cases in which income has escaped assessment, wholly or in part, either by reason of the omission or failure on the part of an assessee to make a return of his income or to disclose fully and truly all material facts or owing to other causes. Section 34 (1) (*a*) and (*b*) deal with the two categories of cases respectively. As regards the period of limitation for such proceedings (*a*) when income has escaped assessment, but such escape is not due to the conduct of the assessee, the period of limitation is four years whatever be the amount, (*b*) where such escape is due to the conduct of the assessee and the amount involved is less than one lakh or more there is no period of limitation. The second proviso to sub-section (3) of section 34 abrogates the period of limitation in all cases, where action is taken in pursuance of a finding or directions given by one of the several authorities mentioned in the proviso. But this proviso cannot apply to cases where the remedy of the department became barred before the proviso became law, *viz.*, 1st April, 1952.

S. C. Parashar v. *Vasantsen Dwarkadas*, (1955) 29 I.T.R. 857, differed from.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to call for the records of the Additional Income-tax Officer, Ootacamund, Nilgiris, in Proceedings No. 86-S/45-46 and issue a writ of prohibition restraining the Additional Income-tax Officer, Ootacamund, Nilgiris District, from continuing the proceedings initiated by him under the said notice under section 34, dated 6th February, 1957, numbered 86-S/45-46.

M. Subbaraya Iyer, V. Sethuraman, S. Padmanabhan, K. R. Ramamani and *S. V. Subramaniam,* for Petitioner.

C. S. Rama Rao Sahib, Special Counsel for Income-tax on behalf of the Respondent.

The Judgment of the Court was delivered by

Balakrishna Ayyar, J.—This is a Petition for the issue of a writ prohibiting the Additional Income-tax Officer, Ootacamund, from continuing certain proceedings which he initiated by means of a notice issued under section 34 of the Income-tax Act, dated 6th February, 1957 and numbered as 86-S/45-46.

The petitioner is an assessee on the file of the Additional Income-tax Officer, Ootacamund, in G.I. No. 86-S. On 18th December, 1946, the Income-tax Officer assessed the petitioner on a total income of Rs. 5,143 under section 23 (3) of the Act. Subsequently, on 31st March, 1956, the Income-tax Officer re-assessed him on a total income of Rs. 39,568. In this amount was included a sum of Rs. 31,000 which the assessee alleged he had taken on loan from Messrs. Mangilal Inderchand, a firm carrying on business in Rajasthan, but which the Income-tax Officer held was Income from undisclosed sources.

The petitioner appealed to the Appellate Assistant Commissioner, Coimbatore and raised various contentions. One point that he took was that the Income-tax

*W.P. No. 612 of 1957. 17th October, 1958. (25th Asvina 1880—Saka).

Officer had not judicially considered the evidence which he had tendered to show that the sum of Rs. 31,000 really represented a loan that he had taken from Messrs. Mangilal Inderchand. Alternatively he contended that in any event the entire sum of Rs. 31,000 would not come in for assessment for the assessment year 1946-47 as his previous year relevant for the assessment year 1946-47 ended on 5th November, 1945, and, it has been held that for assessing the income from other sources the previous year to be adopted is the financial year unless the assessee has any other previous year in respect of the same.

The Appellate Assistant Commisisoner did not accept the contention of the petitioner that the amount represented loans he had taken from Messrs. Mangilal Inderchand. He however found that a sum of Rs. 20,000 out of Rs. 31,000 came in as credits on 25th January, 1945 and 8th March, 1945 and that therefore the amount of Rs. 20,000 could not be assessed in the assessment year 1946-47. He therefore ordered that this sum of Rs. 20,000 should be deleted from the income for that year. This is what the Assistant Commissioner said in respect of this matter:

"I would, therefore, sustain the action of the Income-tax Officer in treating the amount of Rs. 31,000 as income from undisclosed sources. Mr. Sethuraman argued at this stage that in any event the amount of Rs. 20,000 represented by credits on 25th January, 1945 and 8th March, 1945, would properly fall to be assessed in the assessment year 1945-46 following the judgment of the Patna High Court in the case of *Commissioner of Income-tax, Bihar and Orissa* v. *P. Darolia & Sons*[1]. Following the Judgment of the Patna High Court, I would concede the position in favour of the appellant and delete the amount of Rs. 20,000 from the assessment. The Income-tax Officer will be at liberty to re-open the assessment of 1945-46 for including this amount in that assessment."

The assessment for 1945-46 had been completed by the Income-tax Officer on 31st December, 1945. But acting on what the Appellate Assistant Commissioner had said, the Income-tax Officer issued a notice, dated 6th February, 1957, under section 34 of the Income-tax Act calling upon the petitioner to submit a return for the assesmsnet year 1945-46. On 18th June, 1957, the Income-tax Officer also issued a notice under section 22 (4) of the Income-tax Act calling upon the petitioner to produce his books relating to the year ended Deepavali, 1944. Since the notice related to a year eleven years prior to the date of issue of the notice the petitioner wrote to the Commissioner of Income-tax, Madras, asking to be informed how an assessment which was time-barred was sought to be made on him and also his reasons for sanctioning the commencement of the proceedings under section 34 of the Act. On 22nd July, 1957, the Commissioner of Income-tax replied that the proceedings had been initiated by the Income-tax Officer under the second proviso to sub-section (3) of section 34 of the Act, he however refused to inform the petitioner on what grounds he had accorded sanction to the Income-tax Officer to re-open the assessment.

The petitioner has, therefore, come to this Court for the issue of an appropriate writ to prohibit the Income-tax Officer, Ootacamund, from proceeding further with the matter.

The first contention which Mr. Subbaraya Ayyar, the learned advocate for the petitioner, put forward was that the proceedings which the Additional Income-tax Officer, Ootacamund, has now initiated are barred by limitation. His argument may be put this way. If the Income-tax Officer proceeded on the basis of section 34 (1) (*b*) of the Act he should have issued a notice within four years from the end of the assessment year, that is to say, on or before 31st March, 1950. The second proviso to sub-section (3) of section 34 was amended by Central Act XXV of 1953. Sub-section (2) of section 1 of that Act directed:

"Subject to any special provision made in this behalf in this Act, it shall be deemed to have come into force on the 1st day of April, 1952."

The result of it was that the second proviso to sub-section (3) of section 34 of the Act took effect only on 1st April, 1952. But before that date action under section 24 (1) (*b*) had become wholly barred, and if proceedings have once become barred, any subsequent amendments made in the Act cannot be called in aid to re-open the assessment. This was decided in *S. C. Prashar* v. *Vasantsen Dwarkadas*[2]. The facts

1. (1955) 27 I.T.R. 515. 2. (1955) 29 I.T.R. 857.

there were as follows. On 30th April, 1954, the Income-tax Officer served a firm P with a notice under section 34 of the Income-tax Act for the assessment year 1942-43 on the ground that certain income of that year of a firm V should have been included in the income of the firm P but had been wrongly included in the income of D. The Petitioners therefore applied to the High Court for a writ prohibiting the Income-tax Officer from proceeding with re-assessment. Desai, J., held that the Income-tax Officer in issuing the notice on 30th April, 1954, which was more than eight years after 31st March, 1943, was in error because section 34 as amended in 1953 could not apply to the assessment year 1942-43 which did not fall within the eight years preceding April, 1952. On appeal Chagla, C.J. and Tendolkar, J., affirmed the judgment of Desai, J. They held that the remedy available to the Income-tax Officer had already become barred under section 34 before the amendment in the Act made in 1953. The vested right of the assessee could not be affected except by clear and express terms used by the Legislature. The Legislature did not intend to give any retrospective operation further back than 1st April, 1952. The remedy and the right of the Officer to re-assess was lost before 1st April, 1952. In consequence the notice was invalid.

We may explain here that the Bombay case was one under section 34 (1) (*a*) of the Act in relation to which the period is eight years where the income which has escaped assessment is less than one lakh of rupees.

To continue the argument of Mr. Subbaraya Ayyar : if the Additional Income-tax Officer proceeded on the basis of section 34 (1) (*a*) he should have issued his notice within eight years from the end of the assessment year, that is to say, before 1st April, 1954, since the income-tax which is said to have escaped assessment is less than one lakh of rupees. The Income-tax Officer can start proceedings under section 34 (1) (*a*) after the expiration of eight years only if the income that escaped assessment is one lakh of rupees or more. It was so held in *Hiralal Amritlal Shah* v. *K. C. Thomas, Income-tax Officer, W. Ward, Bombay*[1]. And this period of eight years would apply whether or not the notice is issued in consequence of or in order to give effect to any finding or direction by an Income-tax authority contained in an order mentioned in the second proviso to section 34 (3) of the Act. Even though there may be a finding or direction in an order of an Income-tax authority, no notice of re-assessment can be issued against an assesse whose escaped income is less than one lakh of rupees after the expiry of eight years.

These contentions of Mr. Subbaraya Ayyar call for a careful examination of some of the provisions of section 34 of the Act. That section is intended to deal with cases in which income has escaped assessment wholly or in part. Such cases are placed in two broad categories. Where income has escaped assessment wholly or in part, by reason of the omission or failure on the part of an assessee to make a return of his income under section 22 or to disclose fully and truly all material facts necessary for his assessment for that year, it would fall under section 34 (1) (*a*). That is one category. Where income has escaped assessment wholly or in part owing to other causes, it would fall under section 34 (1) (*b*). That is the second category. In respect of cases falling under section 34 (1) (*b*) the Income-tax Officer may commence proceedings for re-assessment at any time within four years of the end of the assessment year. Cases falling under section 34 (1) (*a*) are divided into two sub-categories. Where the income which has escaped assessment wholly or in part is less than one lakh of rupees the Income-tax Officer has to take action within eight years. Where the income which has escaped assessment wholly or in part amounts to one lakh of rupees or more, he may take action at any time. Certain safeguards however are provided for the assessee. One is that the Income-tax officer is required to record his reasons for taking action. The other is that where the Income-tax Officer proposes to take action in cases where eight years have elapsed and the amount involved is one lakh of rupees or more the Central Board of Revenue must be satisfied that it is a fit case for issuing notice. In other cases, that is to say, in cases not reserved for the Central

1. (1958) 34 I.T.R. 446.

Board of Revenue, the Commissioner must be satisfied that it is a fit case for the issue of a notice. There are certain other provisions in the section which are not of present interest.

The provisions regarding limitation contained in section 34 (1) may therefore be thus summarised :

(1) Where income has escaped assessment wholly or in part, but such escape is not due to the conduct of the assessee, the priod of limitation is four years—whatever the amount.

(2) Where income has escaped assessment wholly or in part and such escape is due to the conduct of the assessee and the amount involved is less than one lakh of rupees, the period of limitation is eight years.

(3) Where income has escaped assessment wholly or in part and such escape is due to the conduct of the assessee and the amount involved is one lakh of rupees or more, there is no period of limitation.

We now come to the second proviso to sub-section (3) of section 34 of the Act which runs as follows :—

> "Provided further that nothing contained in this section limiting the time within which any action may be taken or any order, assessment or re-assessment may be made, shall apply to a re-assessment made under section 27 or to an assessment or re-assessment made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order under section 31, section 33, section 33-A, section 33-B, section 66 or section 66-A."

The first thing to be noticed here is that this proviso states "nothing contained in this section" and not "nothing contained in this sub-section". Therefore, this proviso would apply to sub-section (1) also. The next thing to be noticed about this proviso is that it applies only to the "time" prescribed elsewhere in the section and to nothing else. The effect of this proviso therefore is to abrogate or do away with the period of limitation prescribed in the section in those cases where the Income-tax Officer takes action in consequence of a finding or direction given in an order made under section 31, 33, 33-A, 33-B, 66 or 66-A of the Act. The position, therefore, is that when action is taken in pursuance of a finding or direction given by one of the various authorities indicated in that proviso, the Income-tax Officer can take action at any time. This, of course, is subject to the general rule that he cannot take proceedings where before the proviso became law the remedy of the Income-tax Department had already become barred.

The decision in *S. C. Parashar* v. *Vasantsen Dwarkadas*[1], which Mr. Subbaraya Ayyar relied on does not apply here because in that case the remedy of the Department had become barred before the second proviso to sub-section (3) of section 34 became law. So far as *Hiralal Amritlal Shah's case*[2] is concerned we find it difficult with all respect to the learned Judges to agree with the views expressed therein. As we have tried to explain, the second proviso to sub-section (3) of section 34 enacts that

> "Nothing contained in this section limiting the time within which any action may be taken"

shall apply where the Income-tax Officer takes action in consequence of a finding or direction given by the various authorities referred to in that proviso. The effect of these words is to completely abrogate the period of limitation laid down elsewhere in the section. At page 448 the learned Judges say,

> "Now a direction is not necessary for the issue of a notice. But as against that an assessee whose escaped income is not a lakh of rupees is completely protected and even though there may be a direction contained in an order of an Income-tax Authority no notice can be issued against the assessee if the escaped income is less than a lakh of rupees."

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1. (1955) 29 I.T.R. 857.
2. (1958) 34 I.T.R. 446.

This view, it appears to us, does not give full effect to the words employed in the proviso.

That being so, before the plea of limitation which Mr. Subbaraya Ayyar raised can succeed, it must be shown that the remedy of the Department had become barred before 1st April, 1952. This can be shown only if the Department had taken action under section 34 (1) (*b*) since four years from 31st March, 1946, would end on 31st March, 1950. Now in paragraph 2 of his letter, dated 22nd July, 1957, addressed to the petitioner the Commissioner of Income-tax stated as follows :

> " The reasons for which sanction has been accorded by the Commissioner cannot be made known to you."

This sentence would be meaningless unless the intention was to refer to sub-clause (iii) of the first proviso to sub-section (1) of section 34. From that the inference emerges that the Department was taking action under section 34 (1) (*a*) of the Act. The plea of limitation raised by Mr. Subbaraya Ayyar must, therefore, be overruled. Mr. Subbaraya Ayyar next said that there was no finding by the Assistant Commissioner that the amount of Rs. 20,000 would fall to be assessed in 1945-46, and, in this connection he referred to the case reported in *Indurkar* v. *Pravinchandra Hemchand*[1]. An examination of that judgment shows that all that the Assistant Commissioner therein said was, " they could be assessed, *if at all*, for the tax year 1944-45 for which the Income-tax Officer may take necessary steps, *if so advised*." He gave no direction and recorded no finding. The Appellate Assistant Commissioner in the present case, however, has definitely recorded a finding that the sum of Rs. 31,000 represented income from undisclosed sources. He then dealt with the argument of Mr. Sethuraman that the amount of Rs. 20,000 would properly fall to be assessed in the assessment year 1945-46. He accepted that contention following a judgment of the Patna High Court. To our minds this appears to be a finding clear enough to fall within the second proviso to section 34 (3).

Mr. Subbaraya Ayyar next said that the finding was not called for, and referred to *Indira Balakrishna* v. *Commissioner of Income-tax, Bombay North*[2], where the learned Judges commented on the inadvisability of giving findings and expressing opinions on matters that did not really arise. But the present is not such a case. As already stated, Mr. Sethuraman, on behalf of the Petitioner, did raise the points on which the Assistant Commissioner has given his findings. It cannot, therefore, be said that the findings were gratuitous or uncalled for.

Mr. Subbaraya Ayyar then argued that even if it be right to say that the Assistant Commissioner has given a finding in respect of this sum of Rs. 20,000, that finding can be used only in respect of the assessment year in which he gave his decision. To support this argument no authority was cited and it appears to us to be completely untenable. When an assessment is made and either the Department or the assessee appeals, the whole matter would be before the Assistant Commissioner, and no express provision would be necessary to enable him to give directions in respect of a matter already before him. This would apply also to the Commissioner and the Income-tax Appellate Tribunal. It is only to enable the Income-tax Officer to take action in pursuance of a finding recorded or directions given in respect of an assessment different from that covered by the appeal or revision as the case may be that special provision would be necessary. To construe the proviso in the manner in which Mr. Subbaraya Ayyar invited us to do would be to make that proviso otiose.

This is clearly a matter in which the Income-tax Officer has jurisdiction to act. What remedies are open to this petitioner against the decision of the Income-tax Officer does not arise for consideration now. The writ of Prohibition asked for cannot issue. The *rule nisi* is discharged and the petition is dismissed with costs. Counsel's fee Rs. 250.

R.M. ——— *Petition dismissed.*

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1. (1957) 34 I.T.R. 397.

1. (1956) 30 I.T.R. 320.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR AND MR. JUSTICE BASHEER AHMED SAYEED.

United India Fire and General Insurance Company, Madras .. *Appellant**

v.

Trojan and Company and others .. *Respondents.*

Broker and Customer—Relationship—Sale of shares—Price paid by purchaser—Discovery of defect in shares—Liability of broker to deliver other shares free from defects or to refund price—Madras Stock Exchange Association Rules and Regulations, Rules 7 and 44—Scope and effect of.

Under rule 7 of the Rules and Regulations of the Madras Stock Exchange Association, Limited, a contract for the purchase or sale of shares between a member and a non-member has to be treated as one made between principals and under rule 44, if there is any irregularity of title or the genuineness of the scrips, it is the duty of the broker to rectify the defects, when called upon to do so by the buyer of the shares, or to refund the moneys paid to him as the price of the shares.

The brokers are not entitled to plead that they have acted only as brokers and are not in any way responsible for remedying the defects or rectifying irregularities in the transaction which they bring about between themselves and the purchaser. They cannot be allowed to plead that they became absolved from all liability the moment they have brought the parties together and the scrips are delivered to the purchaser. Such a contention is not warranted by the rules governing the transactions of the nature.

The fact that the purchaser does not immediately return the defective scrips to the brokers will not absolve the brokers from their liability to place at the disposal of the purchaser valid and legally effective shares in return for the amount received by them from the broker or in default to pay back the amount received by them.

Appeal against the Decree of the City Civil Court at Madras, in Original Suit No. 105 of 1953.

K. S. Varadachari and *N. C. Srinivasan*, for Appellant.

M. Murugappa Chettiar and *K. M. Venkatavaradachari*, for Respondents 1 and 2.

The Judgment of the Court was delivered by

Basheer Ahmed Sayeed, J.—This Appeal is against the judgment and decree of the learned Principal Judge of the City Civil Court at Madras, in O.S. No. 105 of 1953. The plaintiff who is aggrieved is the appellant.

The suit was orlginally brought for recovery of a sum of Rs. 8,111-4-0 together with interest at 6 per cent. per annum from 12th January, 1953, till date of payment. The facts of the case are that the plaintiff-appellant purchased 123 shares of the New Guardian Life Insurance Company, Madras, through the defendant-respondent for a sum of Rs. 7,500. Bought and sold notes appeared to have been exchanged between the parties. After the scrips were delivered to the plaintiff-appellant by the defendant respondent, it was discovered that the shares belonged to a minor, Panjanathan, on whose behalf the father Ramanathan Chettiar had acted but the fact remains that these shares were already pledged to the defendant-respondent for some amounts due by Ramanathan Chettiar and Sithal Achi. After the scrips were delivered, the plaintiff wrote to the New Guardian Life Insurance Company to effect a transfer of the shares but the said company, however, found that the shares belonged to a minor and that unless the prescribed formalities were completed as laid down in the rules governing transfer of shares, the New Guardian Life Insurance Company was not in a position to effect the transfer. Thereupon the appellant wrote to respondents for rectifying the defects so as to get the transfer effected in the legal form. To this the respondents replied that they were merely acting as brokers and were not responsible for any defects once they had delivered the shares to the appellants and that if there were defects, it was the duty of the appellants to get the defects removed and get the transfers effected by the company concerned. There was prolonged correspondence between the appellants and defendants. But

*C.C.C.A. No. 101 of 1954.

31st October, 1958.
(9th day of Karthika 1880—Saka).

it did not prove of any avail. Ultimately the plaintiffs filed the suit from which this appeal has risen.

The learned City Civil Judge after framing the necessary issues in the suit found that the defendants acted merely as brokers and that the plaintiff purchased the shares from the owner, nemely, Panchanathan, a twelve-year old minor, who is now stated to have attained majority, and that therefore the transaction was between the plaintiff and the owner of the shares and that the brokers were not responsible, once they had brought the two parties together, they having merely acted as brokers. In the result the suit was dismissed by the learned City Civil Judge directing each party to bear his own costs. Against this decision, the plaintiff has preferred this appeal. On other issues with regard to the rate of dividend and interest, the learned City Civil Judge gave his findings in favour of the plaintiff. The plaintiff therefore appealed against the decision.

We have heard both counsel for the plaintiffs as well as the defendants and we think that the view taken by the learned City Civil Judge that the defendants became absolved from all responsibilities, the moment they delivered the scrip to the plaintiffs, does not appear to be sound. The learned Judge has not considered in their proper perspective the rules governing the stock exchage in respect of the transaction with regard to shares. Rule 7 of the Rules and Regulations of the Madras Stock Exhange Association, Limited, is to the following effect.

" Except to the extent and in the manner provided for by these Rules every contract for purchase or sale of shares or other securities whether made between two members or between a member and a non-member shall be deemed to have been made as between principals and each party thereto shall be bound to fulfil the same and entitled to claim performance and institute or maintain legal proceedings in his name as principal ".

In spite of the fact that these rules had been placed before the learned City Civil Judge, the learned City Civil Judge would appear to have misconstrued the scope of the rule and also its application to the facts of the present case. He has been misled into an error when he did not apply the rule as he thought that the rule came into effect long after the transaction. It appears to us that this rule has been in force ever since 1943, though there is lacuna in the rules of the stock exchange—omission to mention in the body of the rules the date from which the rules came into force. The learned City Civil Judge has also overlooked the scope of Rule 44 that applies to the present case. Rule 44 is in the following terms :—

"If a buyer to whom the documents have been delivered and who has paid for the same gives intimation in writing to the party who delivered them of his objection as to their title, regularity or genuineness as soon as it comes to his knowledge, the party who delivered them shall within ten days of such intimation, either remove any irregularity or establish the title or genuineness of the documents as the case may be or replace the same by valid documents, provided the documents have been lodged with the Company for transfer within the period mentioned in the previous rule. In the event of such member failing to deliver such other documents or remedy the defects, within the period of ten days referred to above, he shall refund on return of the defective documents the moneys paid against such documents."

The import of this Rule is that in case there is any irregularity or defect in title or the genuineness of the scrips, etc., it is the duty of the brokers to rectify the defects. This has not been done by the Respondents in spite of their having been called by the appellants in the course of the correspondence after the scrips were delivered.

The defendants appear to have been throughout under the wrong impression that they were merely acting as brokers and that they were in no way responsible for the remedying of any defects or rectifying any irregularity in the transaction which they bring about between themselves and the purchaser. They seemed to have been under the impression that after delivery of the scrips, their responsibility ceased and they have nothing further to do. This is entirely not in accordance with the rules which govern transactions of this nature, regarding the shares of public limited concerns.

There is another point which has to be considered in this connection, namely, that if the plaintiffs had returned the scrips immediately to the respondent, they would have been justified in claiming that the respondent should substitute fresh shares of the same limited concern in place of the ones that were found defective by

reason of the fact that they belonged to a minor. But in so far as the plaintiffs did not deliver back the scrips to the respondents the plaintiffs cannot be right in complaining against the failure of the defendants to substitute fresh scrips in place of the ones that were found defective. However, it does not absolve the respondents from placing at the disposal of the plaintiffs in return for the amount received from them valid and legally effective shares or in default pay back the amount received by them which appears to have remained with them from the date of the suit till the disposal of this appeal. In these circumstances we do not think that the suit has in any way been misconceived or that it was liable to be dismissed as has been done by the learned City Civil Judge.

On a consideration of the entire circumstances that obtain in this case we think the proper order to be made is to direct the plaintiff to return immediately the scrips along with the share transfer certificates, if they are not already returned, to the respondents and to direct the Respondents to refund to the Appellants the sum of Rs. 7,500 received by them with interest at 3 per cent. per annum from the date of its receipt by them till the date of this judgment. From today onwards the rate of interest on the said sum of Rs. 7,500 will be 6 per cent. per annum till such period as the amount is paid to the plaintiffs. The dividend, if any, declared by the company will be received and enjoyed by the respondents. As far as costs are concerned, we direct that the plaintiffs be entitled only to one half of the entire costs in the lower Court and in this appeal. The learned counsel for the minor Panchanathan who has been given notice of the appeal submits that he should be given some amount towards his fees. We do not think that there is any justification for awarding any fees in the circumstances of the case. A decree will issue in terms stated above.

This case having been set down for being mentioned the Court made the following

ORDER.—The thing has come up for mention today. The scrips should be handed over to the first Respondent, Trojan and Company, and the first Respondent, Trojan & Company, alone will be liable to pay the costs ordered by us. No other thing in the judgment in the Appeal calls for any modification.

P.R.N. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE SUBRAHMANYAM.

The Tanjore Permanent Bank hy Secretary, Sri K. Balaram .. *Appellant**

v.

S. R. Rengachari .. *Respondent.*

Banker and Customer—Relationship between—Loss to customer by fraud due to his own negligence in drawing the cheque—Liability of bank—Customer leaving a signed blank cheque with a clerk to fill up—If answerable to the bank for the amount filled up and drawn.

Negotiable Instruments Act (XXVI of 1881), *section* 89—*Applicability.*

A customer is bound to exercise reasonable care in drawing a cheque to prevent the banker being misled. If he draws a cheque in a manner which facilitates fraud, such as leaving blank spaces of an unusual nature which would facilitate interpolation, he is guilty of the breach of duty as between himself and the banker and he will be responsible to the banker for any loss sustained as a natural and direct consequence of this breach of duty. If a customer signs a cheque in blank and leaves it to a clerk or other person to fill up, he is bound by the instrument as filled up by his agent. But this does not mean that a banker can escape liability in cases where the loss was occasioned by their negligence. Where there are alterations apparent on a cheque or where the cheque raises doubts about its authenticity a banker cannot pay the amount without enquiry. Even where the customer has been negligent, if the proximate cause of the loss was due to the fraud practised by the conduct of the bank officials, the customer is not liable.

London Joint Stock Bank Ltd. v. *Macmillan*, L.R. (1918) A.C. 777 and Paget: "Law of Banking", Fifth Edn., page 277, referred.

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* Appeal No. 973 of 1953 and Memo. of Objections. 7th March, 1958.

Appeal and Memorandum of Objections against the Decree of the Court of the Subordinate Judge of Madurai, in Original Suit No. 55 of 1951.

K. Bashyam and *T. R. Srinivasan*, for Appellant.

K. Desikachari, for Respondent.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This is an appeal by the plaintiff in O.S. No. 55 of 1951 in the Court of the Subordinate Judge of Madurai and is confined to the portion of the claim which was disallowed by the learned Judge. The plaintiff is the Tanjore Permanent Bank Ltd., Tanjore. The suit was for recovery of Rs. 12,553-14-6, due from the first defendant on dealings up to 4th December, 1950. The first defendant was a constitutent of the Madurai branch of the plaintiff bank. He had a current account with that branch and he was also granted facilities for discounting bills. The amount claimed is the balance alleged to be due from the first defendant in respect of his current account which was overdrawn. The first defendant had executed a registered memorandum of equitable mortgage on 30th October, 1947, by deposit of title deeds of some of his properties in Madurai for securing overdraft accommodation to the extent of Rs. 15,000. The second defendant was the manager of the Madurai branch during the material period and a decree was claimed against him on the ground that without the sanction of the head office, in collusion with the first defendant, he granted large amounts of overdrafts to the first defendant. The plaintiff prayed for a personal decree against defendants 1 and 2 and a mortgage decree in respect of the properties covered by the equitable mortgage. The first defendant denied that the sum claimed by the plaintiff was due from him and pleaded that on a proper taking of account a sum of Rs. 51-12-5 would be due to him from the bank. He also denied that the equitable mortgage could be enforced to recover the suit amount. He therefore prayed that the suit may be dismissed. The second defendant denied any collusion between him and the first defendant and pleaded that he was not personally liable to any extent. The learned Subordinate Judge who tried the suit passed a decree in favour of the plaintiff as against the first defendant for Rs. 3,215-6-7 and interest thereon at 6 per cent. per annum from the date of suit. In respect of this amount there was a preliminary mortgage decree. The suit as against the second defendant was dismissed. The subject-matter of the appeal is the difference between the amount claimed in the suit and the amount actually decreed by the lower Court.

In this appeal Mr. K. Bahshyam Iyengar, learned counsel for the plaintiff-appellant, dealt with only two of the items in the account between the plaintiff bank and the first defendant, namely, the sums of Rs. 7,600 and Rs. 4,200 debited against the first defendant as moneys paid as per two cheques bearing Nos. 225033 and 225032 on 24th July, 1947 and 5th August, 1947, respectively. The first defendant denied his liability for these two sums. He did not deny that the two cheques in question were signed by him. His case briefly was as follows. He wanted a sum of Rs. 16,000 from the bank. He was asked by the second defendant, the then manager, to send three blank cheques to enable the money being drawn. Actually, however, the total sum of Rs. 16,000 was drawn from the bank on one of the three blank cheques, namely, 225034. According to the first defendant, the other two blank cheques which were not really necessary were not returned to him but they were used by the bank officials to fill them up and draw Rs. 7,600 and Rs. 4,200, respectively. In the cheque for Rs. 7,600 (Exhibit B-80) the payee's name as found is K.R. Subbaraman, admittedly one of the clerks of the first defendant. In the other cheque (Exhibit B-81) the payee's name is shown as Ramachari, another clerk of the first defendant. On the back of the two cheques the names of the respective payees are found. The first defendant, however, denied that the signatures were those of Subbaraman and Ramachari. In the third cheque the payee's name was also K.R. Subbaraman and the first defendant admitted that it was Subbaraman who signed on the back of that cheque. The case developed at the trial was that the accountant, Nallaperumal, filled up the two blank cheques and presumably drew the money for his own benefit.

There is no reliable evidence as regards several important matters. Except the evidence of the first defendant himself there is nothing on record to show that the

first defendant sent with his clerk Subbaraman three blank cheques in accordance with the instructions of the second defendant. The second defendant himself denied that he ever asked the first defendant to send him three blank cheques. The first defendant departed from his original case that the second defendant instructed him to send the three blank cheques and that he was responsible for the unauthorised collection of moneys. Nallaperumal, the accountant, was put forward as the villain of the piece. P.W. 3 the Inspector of plaintiff's branches admitted that the two impugned cheques are in the handwriting of Nallaperumal. Except the entry in the plaintiff's ledger, there is no other evidence of actual payment of the two sums of Rs. 7,600 and Rs. 4,200. Subbaraman was dead by the time of the trial. Ramachari was alive but was not called, nor was Nallaperumal.

It is therefore impossible to say who actually got the benefit of the money represented by the two cheques. The utmost that can be presumed is that money was paid by the bank to someone on the two cheques. The first defendant deposed in his evidence that he knew about these two cheques being filled up and cashed by someone only during the criminal case which was launched against defendants 1 and 2, Nallaperumal and others. The first defendant did not produce his pass book with the plaintiff bank. He said that he gave the pass-book to the second defendant as he wanted to check the entries some time in December, 1947, but it was not returned to him. It is to say the least most surprising that the first defendant should have reconciled himself so easily to the loss of the pass-book. In any event one would have expected him to ask for a duplicate pass-book. The importance of the pass-book lies in this, that it would have shown the two debits in respect of the two impugned cheques and the first defendant, if his case is true, would have immediately set about making enquiries. Actually it is only four years later that the first defendant is attacking the said debits. The learned Subordinate Judge held that Nallaperumal, the accountant of the Madurai branch, forged the two cheques, filled them up himself and passed them for payment to himself and misappropriated the two amounts of Rs. 7,600 and Rs. 4,200. Therefore, he held that the first defendant could not be debited with these two amounts. He practically exonerated the second defendant from the fraud. Throughout his discussion on this point the learned Judge assumed that Nallaperumal had passed the cheques for payment *to himself*. But we are unable to find any evidence to support this assumption. Even assuming that Nallaperumal filled up the body of the cheques over the first defendant's signature, he might have done so on instructions of the first defendant's clerk. One can speculate on several possibilities, like for instance, one of the first defendant's clerks himself drawing the amounts and misappropriating them.

Though it is true that Nallaperumal certified that necessary funds were available and passed the cheques for payment, there is no proof that he received the moneys by cashing the cheques or in any other way. We cannot therefore accept the conclusion of the learned Subordinate Judge merely on the ground that Nallaperumal must have misappropriated the amounts, and being an official of the bank, the bank should bear the loss. The question, therefore which falls for decision is whether the bank could lawfully sustain the two debits made by it against the first defendant or whether the loss should fall on the bank for any other reason.

Mr. Bashyam's main contention was that if any loss was sustained by the first defendant in respect of the two cheques in question, it was entirely due to his own negligence and the opportunity which he afforded by handing over cheques signed by him but otherwise blank. He strongly relied on the decision of the House of Lords in *London Joint Stock Bank* v. *Macmillan and Arthur*[1]. The facts in that case were as follows: A firm who were customers of a bank entrusted to a confidential clerk the duty to fill in their cheques for signature. The clerk presented to one of the partners of the firm for signature a cheque drawn in favour of the firm or bearer. There was no sum in words written on the cheque in the space provided for the writing but there

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1. L.R. (1918) A.C. 777.

were the figures " 2.0.0 " in the space intended for figures. The partner signed the cheque. The clerk subsequently added the words " one hundred and twenty pounds " in the space left for words and wrote the figures " 1 " and " 0 " respectively on each side of the figure " 2 ", which was so placed as to leave room for the interpolation of the added figures. The clerk presented the cheque for payment at the firm's bank and obtained payment of £120. The bank debited the firm's account with the full amount of the cheque as presented to them. The firm brought an action against the bank claiming a declaration that the bank was not entitled to debit their account in respect of the cheque beyond the amount for which it was originally drawn. The learned trial Judge found that there was no negligence on the part of the firm and decreed the suit. The Court of Appeal confirmed this decision. On appeal the House of Lords reversed the judgment of the Court of Appeal and dismissed the action of the firm. Lord Finlay, L.C., thus summed up the legal position :

"It is beyond dispute that the customer is bound to exercise reasonable care in drawing the cheque to prevent the banker being misled. If he draws the cheque in a manner which facilitates fraud, he is guilty of a breach of duty as between himself and the banker, and he will be responsible to the banker for any loss sustained by the banker as a natural and direct consequence of this breach of duty. As the customer and the banker are under a contractual relation in this matter, it appears obvious that in drawing a cheque the customer is bound to take usual and reasonable precautions to prevent forgery. Crime, is indeed, a very serious matter, but every one knows that crime is not uncommon. If the cheque is drawn in such a way as to facilitate or almost to invite an increase in the amount by forgery if the cheque should get into the hands of a dishonest person, forgery is not a remote but a very natural consequence of negligence of this description."

Dealing with the actual case before him the noble Lord Chancellor said thus :

"The question whether there was negligence as between banker and customer is a question of fact in each particular case, and can be decided only on a view of the cheque as issued by the drawer, with the help of any evidence available as to the course of dealings between the parties or otherwise. If the existence in a cheque of blank spaces of an unusual nature and such as to facilitate interpolation is declared to be no evidence of a breach of duty as between customer and banker, the duty would have little left to operate upon. To recognize the duty of care by the customer in drawing cheques and then to lay down as a matter of law that there is no breach of that duty by leaving such blank spaces in the cheque is in effect to eviscerate the duty ".

The following observations have a direct bearing on the case before us.

" But, further, it is well settled law that if a customer signs a cheque in blank and leaves it to a clerk or other person to fill it up, he is bound by the instrument as filled up by his agent."

The decision of the House of Lords in this case has been understood to have demolished the earlier ruling of the Privy Council in *Colonial Bank of Australasia, Limited* v. *Marshal*[1], where it was held that the mere fact that a cheque is drawn with spaces which can be utilised for the purpose of fraudulent alteration is not by itself any violation of duty by a customer to his banker.

As a pronouncement of the House of Lords, the decision is certainly entitled to the greatest weight ; but it has been pointed out in leading text-books like that of Paget's Law of Banking (5th Edition, Page 277) that this case

" must not be pressed so as to impugn the principle that the banker cannot set up an estoppel against the customer where his own negligence has contributed to the loss, as where the alteration was obvious or discoverable by the exercise of reasonable care, or where the state of the cheque raised fair suspicion of its having been tampered with and payment was made without inquiry."

As the Lord Chancellor expressly said in the *Macmillan Case*[2], the question of negligence as between banker and customer is a question of fact in each particular case. Now the undisputed facts here are that the two cheques in dispute were filled in by Nallapermual, an official of the bank. No doubt the cheques were drawn in favour of two of the clerks of the first defendant and purport to be signed by them on the back of the cheques. But the first defendant denied the genuineness of the signatures and there was no evidence to the contrary. The learned trial Judge came to the conclusion that Nallaperumal, the accountant of the plaintiff's bank at Madurai, forged these two cheques filling them up himself and passing them for payment himself. He further found that he misappropriated

1. L.R. (1906) A.C. 559. 2. L.R. (1918) A.C. 777.

those amounts. Having regard to these facts, it cannot be said that the loss was sustained on account of the negligence of the first defendant. Even if there was negligence on his part, the proximate cause of the loss was the fraud committed by one of the officers of the bank. We are of the opinion that the principle of the *Macmillan case*[1] will not be applicable to the facts of the present case. That particular facts can take a case out of the scope of the rule in the *Macmillan case*[1] is clear by the decision in *Slingsby* v. *District Bank Limited*[2]. In that case the plaintiffs drew a cheque in favour of a company of stockbrokers, John Prust Co. and handed over the cheque to a partner of a firm of solicitors called Cumberbirch and Potts. Cumberbirch took the cheque and altered it by writing after the payee's name the words "per Cumberbirch & Potts" and signing it with his own name paid the cheque into the account at that bank of a company of which he was chairman, as payment on his own private account. Obviously neither the cheque nor the proceeds of it went to John Prust & Co. In an action by the customers, the bank sought to rely on the ruling in the *London Joint Stock Bank* v. *Macmillan and Arthur*[1] but Wright J., held that the principle would not apply to the facts of the case because the forgery as the one which had been committed by Cumberbirch was not one which the plaintiffs could reasonably anticipate or be expected to guard against. Therefore there was no breach of duty by the plaintiffs towards the bank. In the present case it might well be said that the first defendant could not have contemplated an official of the bank committing forgery and misappropriating the moneys.

Mr. Bashyam Ayyangar also referred us to section 20 of the Negotiable Instruments Act. It runs thus:

"Where one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments then in force in India, and either wholly blank or having written thereon an incomplete negotiable instrument, he thereby gives *prima facie* authority to the holder thereof to make or complete, as the case may be, upon it a negotiable instrument, for any amount specified therein and not exceeding the amount covered by the stamp, the person so signing shall be liable upon such instrument, in the capacity in which he signed the same, to any holder in due course for such amount: Provided that no person other than a holder in due course shall recover from the person delivering the instrument anything in excess of the amount intended by him to be paid thereunder."

The short answer to this is that in no sense can Nallaperumal be deemed to be the 'holder' of the two cheques. The cheques were actually delivered over, according to the first defendant, to his clerk Subbaraman, and it is not the case of any one that the two blank cheques were converted by Subbaraman. On the other hand there is the positive finding of the Court below that it was Nallaperumal who converted the cheques.

Mr. Desikachari who appeared for the first defendant-respondent also relied on another circumstance as relieving him of all liability in respect of the two cheques. The two cheques on their face contain material alterations in the nature of corrections. In respect of the cheque for Rs. 7,600 there are two corrections; but they have not been initialled by the drawer, and in the other cheque there is a correction of the figure and words without any initials of the drawer. What was originally Rs. 1,200 was changed into Rs. 4,200. Under section 89 of the Negotiable Instruments Act, where a cheque has been materially altered but does not appear to have been so altered, payment thereof by a banker liable to pay, and paying the same according to the apparent tenor thereof at the time of payment and otherwise in due course, shall discharge such banker from all liability thereon. The question is whether the alterations in these two cheques were apparent or not. After looking at the cheques we are of the opinion that there are clear indications of material alteration. We accept the following statement of the law in Bhashyam and Adiga's "Negotiable Instruments Act," 10th Edition:

"The bank has also to see whether there are any alterations in the cheque, and whether they have been properly authenticated. Therefore, where an alteration in a cheque is initialled not by all the drawers but only some of them, the bank will be paying the amount on the said cheque at its own risk. In this connection it is necessary to notice that under section 89 protection is afforded to the bank paying a cheque where the alteration is not apparent."

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1. L.R. (1918) A.C. 777. 2. L.R. (1931) 2 K.B. 588.

We see great force in this contention of Mr. Desikachari. Except the entry in the bank's accounts, there is no evidence to show that the money under the two cheques in question was actually paid over to Subbaraman and Ramachari respectively. This lacuna assumes importance in the light of the other circumstances of the case particularly the fact that it was Nallaperumal who filled in the blank cheques.

We hold that the loss sustained by the first defendant was not due to his own negligence as the proximate cause, that the loss was really due to the fraudulent conduct on the part of one of the bank's officials, and that there is no evidence that the moneys under the two cheques were paid over to the ostensible payees. It follows that the first defendant cannot be held liable for the two amounts debited against him in respect of the two cheques in question.

The appeal fails and is dismissed ; but in view of the fact that it was the initial action of the first defendant in handing over blank cheques to his clerk that led to the further happenings, we will make no order as to costs. The memorandum of cross-objections which was not pressed is dismissed. No costs.

R.M. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Ramaswami Padayachi .. *Petitioner**

v.

Shanmugha Padayachi .. *Respondent.*

Civil Procedure Code (V of 1908), *Order* 47, *rule* 1—*Construction and scope—Discovery of new and important matter, etc."—Meaning of—Duty of applicant for review—" Mistake or error apparent on the face of the record "—Erroneous view of law or failure to interpret the law correctly—If ground for review— Any other sufficient reason "—Interpretation of.*

When a review is sought under Order 47, rule 1, Civil Procedure Code, on the ground of the discovery of new evidence, such evidence must be (1) relevant and (2) of such a character that, if it had been given in the suit, it might possibly have altered the judgment. The new evidence must at least be such as is presumably to be believed, and, if believed, would be conclusive. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made. The party seeking a review should prove strictly the diligence he claims to have exercised and also that the matter or evidence which he wishes to have access to is, if not absolutely conclusive, at any rate, nearly conclusive. A bare assertion in the affidavit that the party could not trace the documents earlier will not do. It is not the proper function of a review application to supplement the evidence or to make it serve the purpose of merely introducing evidence which might possibly have had some effect upon the result.

Brown v. *Dean,* L.R. (1910) A.C. 373 ; *Sivalingappa,* I.L.R. 29 Cal. 717 : A.I.R. 1915 P.C. 78; *Pyare Lal* v. *Chotey Lal,* A.I.R. 1942 All. 82 ; *Mahadeva* v. *Commissioner of Hindu Religious Endowments, Madras,* (1956) 1 M.L.J. 309 and other cases referred to.

The mistake or error justifying a review under Order 47, rule 1, is most often an error of fact and may in certain cases be one of law also. But in all cases it should be an error of inadvertence ; in the case of an error of law it should not have been arrived at by a process of conscious reasoning and the correction suggested or asked for should be such that the bare statement carries conviction without further reasoning or extraneous matter. The test is whether the Court itself would have made the correction if it was aware of the particular fact or circumstance while writing the judgment. An erroneous view on a debatable point of law or a failure to interpret the law correctly would not be a mistake or error apparent on the face of the record.

Moran Mar Basselios Catholicos v. *Athanasius,* (1954) S.C.J. 736 : (1955) 1 S.C.R. 520 ; *Keshodas Wadhumal* v. *Syed Murtnja,* A.I.R. 1952 All. 318 ; *Ussain* v. *Kuniraman,* (1953) 1 M.L.J. 132 and *Rameswaraswami* v. *Ramalinga Raju,* (1958) 1 An.W.R. 290 and other cases relied on.

The expression " any other sufficient cause " in Order 47, rule 1, must be interpreted to mean a reason sufficient on grounds at least analogous to those specified immediately before. It must be *ejusdem generis* to the reasons previously stated. An excusable failure to bring to the notice of the Court the relevant material or the mistake of counsel would be a " sufficient cause ".

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*C.R.P. No. 1089 of 1958. 21st August, 1958. (30th Sravana 1880—Saka.)

Herit Krishna v. *Anil Krishna*, A.I.R. 1951 Cal. 469 and *Ram Das* v. *Gqnga Das*, A.I.R. 1956 Pat. 20, relied on.

Where a judgment is based on two or more grounds, each of which is sufficient to sustain it independently of the others it is not liable to be reviewed even though one of the said grounds is erroneous and the error may even be apparent on the face of the record. It cannot be said that in such a case there is " any other sufficient reason " within the meaning of Order 47, rule 1, Civil Procedure Code.

Petition under section 25 of Act IX of 1887 praying the High Court to revise the order of the Court of the District Munsif of Virudhachalam, dated 25th March, 1958, and made in I.A. No. 27 of 1958 in S.C.S. No. 827 of 1957.

T. V. Balakrishnan and *N. Vanchinathan*, for Petitioner.

Respondent not represented.

The Court delivered the following

JUDGMENT.—This is a Civil Revision Petition sought to be preferred against the order made by the learned District Munsif of Virudhachalam in I.A. No. 27 of 1958 in S.C.S. No. 827 of 1957, declining to review the decree and judgment therein made on 10th December, 1957.

The facts are :—The petitioner was the defeated plaintiff in the aforesaid Small Cause Suit, which was filed for recovery of the amount due on a promissory note executed by the deceased brother of the defendant in favour of the plaintiff on 18th June, 1954, for Rs. 225. The defendant contended that his brother Chinnamani did not execute the alleged suit promissory note and that it has been fabricated. The plaintiff examined himself as P.W. 1, the scribe of the promissory note as P.W. 2 and an attestor mentioned therein as P.W. 3. On the other hand the defendant examined himself as D.W. 1. On the evidence it was contended that the suit promissory note is a fabrication on the ground that firstly, the defendant's brother was bedridden with tuberculosis for a year before his death and therefore could not have gone to Virudhachalam to execute the suit promissory note ; secondly, that there were several circumstances like differences in ink in the promissory note and alleged occasions on which the amounts assured in the promissory note were said to have been paid ; and finally the non-tallying of the signature of the executant of the promissory note with his admitted signature in Exhibits B-2 to B-5 and the discrepancies in the evidence of the witnesses. The learned District Munsif held that it had been proved to his satisfaction that the deceased Chinnamani executed the suit promissory note and dismissed the suit.

Thereupon a review application was filed stating that the two documents produced therewith should be admitted and the decree and judgment reviewed. The first document is a registered sale deed, dated 12th July, 1954, executed by Chinnamani in favour of plaintiff's daughter. The second document is a promissory note, dated 27th October, 1945. The suit promissory note is dated 18th June, 1954. The object of filing the above documents was to show that Chinnamani could have gone to Virudhachalam and executed the suit promissory note.

The learned District Munsiff came to the conclusion that no ground had been made out within the limits of Order 47, rule 1, Civil Procedure Code for reviewing the judgment. Hence this Revision Petition by the defeated plaintiff.

On a review of the entire circumstances of the case, I have come to the same conclusion as the learned District Munsif. Here are my reasons :

A party aggrieved by a decree or a decision specified in clauses (*a*), (*b*) or (*c*) of sub-rule (1) of Order 47, rule 1 may apply for a review in any of the following cases :—

(i) On the ground of the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the party or could not be produced by him at the time when the decree was passed or order made : or

(ii) on account of some mistake or error apparent on the face of the record ;

or

(iii) for any other sufficient reason.

It is now well-settled that when a review is sought on the ground of the discovery of new evidence, the evidence must be (1) relevant and (2) of such a character that if it had been given in the suit it might possibly have altered the judgment. As stated by Lord Loreburn, L.C., in *Brown* v. *Dean*[1], "It (new evidence) must at least be such as is presumably to be believed, and if believed would be conclusive". Application on this ground must be treated with great caution and as required by rule 4(2) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. It is not only the discovery of new and important evidence that entitles a party to apply for review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made. Thus, an application under Order 47, Rule 1, Civil Procedure Code, must be treated with considerable measure of caution. That is a matter of public policy as it is obviously necessary that, save in exceptional circumstances, finality in litigation should be achieved at some point. The person who wants a review should at least prove strictly the diligence he claims to have exercised and also that the matter or evidence which he wishes to have access to, is if not absolutely conclusive, at any rate, nearly conclusive of the matter. It is not the proper function of a review application merely to supplement the evidence or to make it serve the purpose of merely introducing evidence which might possibly have had some effect upon the result. *Ganga Ram* v. *Saradha*[2], *Sivalingappa* v. *Revappa*[3] and *Pyare Lal* v. *Chhotey Lal*[4], Rel. on; *Basant Kumar* v. *Dinamani Singh*[5], (Case-law discussed); *Chunilal* v. *Manodara*[6], *Jutha Premji* v. *Faria*[7], *Lohku* v. *Phola*[8] and *V. Mahadeva* v. *Commissioner of Hindu Religious Endoments, Madras*[9].

Bearing these principles in mind, if we examine the facts of this case, we find that the petitioner was in possession of these documents from 12th July, 1954 and 27th October, 1955. The suit was disposed of on 10th December, 1957. Therefore a bare assertion in the affidavit that he could not trace these documents earlier will not do. This case was not disposed of solely on the question whether Chinnamani could have gone to Virudhachalam or not on the date of execution of the suit promissory note. The judgment in the suit took into consideration other circumstances in arriving at the conclusion that a decree could not be given on the basis of the suit promissory note. The object of the petitioner is nothing more than adding of additional and supplementary evidence in the pious hope that trying his luck once again, he may prove successful. Therefore, this application will not fall under the clause "discovery of new and important matter or evidence."

The next available ground is "mistake or error apparent on the face of the record". It is now well settled that the mistake or error justifying a review under Order 47, rule 1, Civil Procedure Code, is most often an error of fact and may in certain cases be one of law also. But in all cases it should be an error of inadvertence ; in the case of an error of law it should not have been arrived at by a process of conscious reasoning. Further, if it is an error of law, the correction suggested or asked for should be such that the bare statement carries conviction without further reasoning or extraneous matter. So, an erroneous view on a debatable point of law or a failure to interpret the law correctly would not be an error of law apparent on the face of the record. The test in such matters is whether the Court itself would have made the correction if it was aware of the particular fact or circumstance while writing the judgment. In other words, whether it is an inadvertent mistake or error or a conscious application of mind leading to a result which one party may consider to be erroneous or a mis

1. L.R. (1910) A.C. 373.
2. A.I.R. 1955 Him. Pra. 25.
3. (1915) I.L.R. 29 Cal. 717 : A.I.R. 1915 P.C. 78.
4. A.I.R. 1942 All. 82.
5. A.I.R. 1955 Manipur 17.
6. A.I.R. 1952 Kutch 25.
7. A.I.R. 1952 Kutch 67.
8. A.I.R. 1955 N.U.C. (Bilaspur) 4842.
9. (1956) 1 M.L.J. 309: I.L.R. (1956) Mad. 624: A.I R. 1956 Mad. 522.

take : *Moran Mar Basselios Catholicos* v. *Athanasius*[1]; *Keshodas Wadhumal* v. *Syed Murtuja*[2], *Dharma Das* v. *Safiwan*[3], *Ussain* v. *Kuniraman*[4], *Abdul Aziz* v. *Jai Ram*[5], *Rameswaraswami* v. *Ramalinga Raju*[6], *Maula Bux and sons* v. *State of V.P.*[7] *Puyan Liklai Singh* v. *State*[8], *Durgadas* v. *Ibrahim Ali*[9], and *Balchand* v. *State*[10]. On the foot of this settled law, if we examine the facts of this case, we find that there is no error apparent on the face of the record.

Nor can the facts of this case be said to come under the clause "for any other sufficient reason." It is now well settled that the words "any other sufficient reason" in Order 47, rule 1, Civil Procedure Code, should be interpreted as amounting to a reason sufficient on grounds, at least analogous to those specified immediately previously. It is loosely said that this means that the sufficient reason must be *ejusdem generis* to the reasons previously stated. The words "analogous reason" are however wider and mean a reason having resemblance or similar in certain circumstances to the reasons previously stated. Thus, an excusable failure to bring to the notice of the Court the relevant material is covered by the terms of Order 47, rule, 1 Civil Procedure Code. The mistake of the counsel would be a suffiicent ground for granting review as "any other sufficient cause." *Ram Das* v. *Ganga Das*[11], *Ram Murti* v. *Bank of Patiala*[12], *Harit Krishna* v. *Anil Krishna*[13], and *Devji Vasta* v. *Dhanji Nanji*[14].

But where as in this case, the judgment is based on two or more grounds, each of which is sufficient to sustain it independently of the other, it is not liable to be reiewed, even though one of the said grounds on which the judgment is based is erroneous and the error may even be apparent on the face of the record. Therefore, the review application cannot be brought in under the clause" any other sufficient reason."

The conclusion of the learned District Munsif declining to review is irreproachable and this Revision Petition is dismissed.

P.R.N. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

H.V. Jain .. *Petitioner**

v.

The Joint Chief Controller of Imports and Exports, Madras-1 .. *Respondent.*

Imports and Exports Control Act (XVIII of 1947)—Rules in the Import Trade Control Policy Book—Transfer of the business or dissolution of a firm of established importers—Rights of the partners continuing the firm to quota rights—Construction of rules.

Though the Imports and Exports Control Act itself does not contain any specific provisions in that regard the Import Trade Control Policy Book issued by the Government of India contain the rules regarding transfer of quota rights of an established importer in cases of change in the constitution of name of a business or where a business changes hands. The rules contemplate four classes of cases of such transfer or change. In cases of dissolution of a partnership which had quota rights in its favour, the following conditions should be satisfied before the quandom partners could claim their respective quota rights under the agreement, (*viz*): (*a*) the firm must be dissolved ; (*b*) the partners must have agreed to divide the business, its assets and liabilities, (*c*) its goodwill must be taken over by one or the partners, or none of them should be allowed to use it and (*d*) the agreement must contain a provision relating to the quota rights. If these conditions are satisfied the partners shall get their respective share in the quota rights according to the provisions of the agreement. In such cases the rights of partners are not postponed till such time as the Chief Controller of Imports and Exports recognise the transfer.

(Scheme of the rules explained.).

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1. (1954) S.C.J. 736 : (1955) 1 S.C.R. 520 : A.I.R. 1954 S.C. 526.
2. A.I.R. 1952 All. 318.
3. A.I.R. 1951 V.P. 44.
4. (1953) 1 M.L.J. 132 : 66 L.W. 70 : A.I.R. 1953 Mad. 519.
5. A.I.R. 1951 H.P. 67 (Case law reviewed).
6. (1958) 1 An.W.R. 290.
7. A.I.R. 1956 Vin. Pra. 1.
8. A.I.R. 1950 Manipur 18.
9. A.I.R. 1952 Bhopal 15.
10. A.I.R. 1951 Raj. 85.
11. A.IR. 1956 Pat. 20.
12. A.I.R. 1951 Pepsu 54.
13. A.I.R. 1951 Cal. 469.
14. A.I.R. 1952 Kut. 45.

*W.P. Nos. 107 and 216 of 1958.

20th November, 1958.
(29th Kartika 1880—Saka).

Petitions under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue a writ of *mandamus* directing the Respondent to issue import licences to the petitioner on the basis of his succeeding to his share of the licence in the dissolved partnership of M/s. Sha Bhagajee Sonmull, Madras, as and from 21st November, 1956, and to issue import licences with respect to articles mentioned in Ex. B (I. T. C. Appeal 351 of 1957, dated 10th January, 1958, on the file of the Joint Chief Controller of Imports and Exports, Madras 1) to the Petitioner.

R. M. Seshadri, for Petitioner in both the Petitions.

The Government Pleader (*B. V. Viswanatha Iyer*) for Respondent in both.

The Court made the following

ORDER.—M. S. Sha Bhagajee Sonmull, Madras, was a firm of "established importers" within the meaning of Rule 12 of the Import Trade Control Policy|Rules issued by the Union Government. The firm had four partners. In 1956 the members of the firm resolved to dissolve the partnership and by an agreement executed on 26th November, 1956, the quota rights which the firm had for importing various articles were divided in equal shares among all the four ex-partners. The Import Control Rules require that information relating to any change in the constitution of a firm or its dissolution should be reported to the Chief Controller of Imports, New Delhi. Immediately after the dissolution of the firm intimation of the fact was given to the Chief Controller of Imports by a letter, dated 30th November, 1956. By an order, dated 9th April, 1957, the Chief Controller approved the transfer of the quota rights which the firm had held to its quondam partners. But he made it clear that the order would take effect only "in future". The result of it was that the petitioner was given a quota only for January to June, 1957, and his application for quota for July to December, 1956, for various articles was rejected.

The case of the petitioner is that he is entitled to a quota with effect from the date on which the transfer was effected and not merely with effect from the date on which the transfer was recognised by the Chief Controller of Imports.

W.P. No. 107 of 1958 has been filed for the issue of a writ of *mandamus* or other appropriate direction to the Joint Chief Controller of Imports and Exports, Madras, to issue import licences to the petitioner with effect from the date of the dissolution of the partnership. In the petition this date is given as 21st November, 1956, but, during the arguments I was told that it is an error for 26th November, 1956.

In respect of one article, *viz.*, coffee machines, quota was refused on the further ground "that the item is currently banned."

Writ Petition No. 216 of 1958 has been filed for issue of writ of *mandamus* or other appropriate direction to the Joint Chief Controller of Imports and Exports, Madras, to grant quota for this article to the petitioner.

The Joint Chief Controller of Imports and Exports filed a joint affidavit in both these writ petitions. Therein he stated that a licence is necessarily personal and that when it is granted to a firm of partners, none of the partners can on dissolution of the partnership claim that he is an established importer in his own right. When an application is received for recognition of the transfer the Chief Controller examines the agreements and hears the objections, if any, received in response to advertisements issued and then he

> " divides the quota rights of the firm and sanctions appropriate shares to such persons as appear to be entitled on the material before him. It is only then that the separating partner becomes eligible for licences and an established importer in his own right.

. . . . . .

Thus on the dissolution of a firm, none of the quondam partners was eligible for a licence in his own right as an established importer unless and until the Chief Controller of Imports and Exports was satisfied that he should be made eligible by issuing a quota certificate to him ".

As regards the coffee machines which were referred to as an item currently banned, the counter explained,

"The fact that the item in question in W.P. No. 216 of 1958, namely, "coffee machines" was banned was merely brought to the notice of the petitioner and was not the ground for rejection of the application."

If the case of the respondent had been for instance that for some reason or other the situation of the Government in relation to foreign exchange was such that they could not possibly issue the quota for the period, July to December, 1956, the matter would have stood on an entirely different footing. Similarly also if the case of the respondent had been that import of the articles had been prohibited. The Respondent, however, does not rest his case on either of these grounds or any other similar ground. His case is that the petitioner would become entitled to his quota only after the transfer or division has been recognised by the Chief Controller of Imports. I have now to consider how far this contention is right.

The Export and Import Control Act gives no guidance on the point. The rules that apply to a case like the present are found on page 20 of the Import Trade Control Policy Book issued by the Government of India for July-December, 1956. I quote the relevant passages :—

I. "When a change occurs in the constitution or the name of a firm if the business changes hands, the reconstituted firm will not be entitled to the quotas of the original firm until the transfer of the quota rights in their favour has been approved by the Chief Controller of Imports and Exports or other licensing authority in cases covered by clause (*c*) below. The following are the general principles followed in regard to such cases :

II. (*a*) *Transfer of quota rights.*—(i) Where the business of a firm is transferred together with all its assets, liabilities and goodwill to another firm so as to constitute it its successor in all respects, the transferee firm shall get the quota rights of the transferred firm.

III. (ii) Where a firm is dissolved or wound up or ceases to carry on business without making provision for transfer of its business, assets, liabilities and goodwill, no one will be entitled to the quota rights admissible to that firm.

IV. (*b*) *Division of quota rights.*—Where a firm is dossolved, and the partners agree to divide its business, assets and liabilities and its goodwill is taken over by one of the partners or none of them is allowed to use it, the partners shall get their respective share in the quota rights according to the provision of the agreement."

The learned Government Pleader seemed very strongly to think that the first of the four passages I have quoted above is authority for the position that where a firm has been dissolved and the quota rights of the firm divided among the quondam partners the rights of the individual partners would take effect only from the date on which the transfer is recognised by the Chief Controller of Imports and Exports. But, if one reads the passage carefully it will be noticed that it has no application to a case like the present. What it says is that

"that re-constituted firm will not be entitled to the quotas of the original firm until the transfer of the quota rights in their favour has been approved."

This makes it clear that this rule applies only when a new or reconstituted firm takes the place of the old one and that it has no application where a firm is dissolved. In order that this rule may apply one of three conditions must be first satisfied. There must be a change in the constitution of the firm, or there must be a change in the *name* of the firm or the business must have *changed* hands. It may properly be said that the third condition has been satisfied in the present case. But that alone is not sufficient. The rule further requires that there should be a reconstituted firm. That condition has not been satisfied in the present case.

The learned Government Pleader then contended that when a firm is dissolved and the quota rights of the firm are divided among the partners, the quondam partners are not as of right entitled to a quota. He sought support for this argument in the third of the passages I have quoted above. This is how he invited me to construe the passage. Where a firm is dissolved no one will be entitled to the quota rights

admissible to that firm; when a firm is wound up no one will be entitled to the quota rights admissible to that firm ; when a firm ceases to carry on business without making provision for transfer of its business, assets, liabilities and goodwill, no one will be entitled to the quota rights admissible to that firm. In other words, he invited me to to read the passage as though the stipulation contained in the expression "without making provision for transfer of its business, assets, liabilities and goodwill" applied only to "ceases to carry on business." I do not think that is the correct way of reading the passage. The stipulation applies to all the three contingencies mentioned earlier in that passage, *viz.*, the dissolution of the firm, the winding up of the firm and the cessation of business by the firm. When we read the fourth passage I have quoted above it will be appreciated that there is no room at all for any argument of the kind advanced by the learned Government Pleader, because it makes specific provision for the division of quota rights when a firm is dissolved.

In order to satisfy the requirements of the fourth passage it is enough if the following conditions are satisfied:

(1) The firm must be dissolved.

(2) The partners must be agreed to divide its business, assets and liabilities.

(3) Its goodwill must be taken over by one of the partners, or none of them should be allowed to use it.

(4) The agreement must contain some provision relating to the quota.

When that happens the passage says,

> " the partners *shall get their respective share* in the quota rights according *to the provisions of the agreement.*"

The word 'agreement' occurring in this passage can relate only to the word "agree" referred to earlier in that passage. This means that in a case like the present, if the agreement of division contains specific provision in that regard, the partners would be entitled to the quota rights in accordance with the terms of the agreement. I can see no justification whatever for the argument of the learned Government Pleader that in a case of this kind the right of the partners is postponed till such time as the Chief Controller of Imports and Exports recognises the transfer. In cases where it is intended that the transfer should take effect only when it is recognised by the Chief Controller, express provision has been made as where a new firm or reconstituted firm takes the place of the old. It seems to me that the absence of such a provision in relation to a situation arising out of the dissolution of a firm and the division of the quota rights of the firm is destructive of the argument of the learned Government Pleader.

The learned Government Pleader referred to the decisions in *Desai Goundar & Co.* v. *Dy. Controller of Imports*[1], and *Srinivas* v. *Director of Controlled Commodities*[2]. Neither of them has any application to the facts of this case. All that was decided in the former case was, that the regulation that an applicant for a licence to import goods under the Import Trade Control Regulation should produce an income-tax verification certificate, is not an unreasonable restriction on a person's fundamental right to carry on business because no one has a fundamental right to obtain a quota under a licence. That decision, therefore, relates to a case where a quota had not yet been granted. The second decision relates to a case where a quota had lapsed and the person who previously held the quota applied for the grant of a fresh quota. In effect, therefore, that case too related to a stage prior to that in which a quota had been obtained.

The decision most in point is that of Rajagopalan, J., in Writ Petition No. 569 of 1955. The facts there were as follows : One Janardhan Rao was the sole proprietor of a concern called Rao and Company. He was recognised as an "established shipper" entitled to quotas for export of groundnut oil. Janardhan Rao was adjudged an insolvent. Rao and Company, one of his assets, was sold as a going concern by the Official Assignee, and one Venkataramiah Chetty purchased it at a sale held on 26th November, 1954. The Official Assignee executed a registered sale

1. (1955) 2 M.L.J. 564. 2. (1952) 2 M.L.J. 113.

deed on 3rd December, 1954. Thereafter Venkataramiah Chetty became the sole proprietor of Rao and Company, and, therefore, entitled to the quota rights held by Rao and Company. The departmental authorities recognised the transfer in favour of Venkataramiah Chetty with effect from 4th February, 1955, and, while agreeing to grant him a quota with effect from that date refused to give a quota with effect from the date on which he succeeded to the assets of Rao and Company. Venkataramiah Chetty then came to this Court with a writ petition and it was held that he was entitled to the quota with effect from the date on which the rights of Rao and Company devolved on him. The passage in the Rules governing the case in Writ Petition No. 569 of 1955 was, I was told, identical in terms with the second of the passages I have quoted above from page 20 of the Import Trade Control Policy Book.

Apart from the decision in Writ Petition No. 569 of 1955, on the language relating to the division of quota rights set out in the last of the four passages I have quoted earlier, the petitioner is entitled to succeed. The Department was clearly making a mistake when it read the rules in the way it has done. The *rule nisi* is made absolute. The petitioner will be entitled to his costs in W.P. No. 107 of 1958. No costs in W.P. No. 216 of 1958. Advocate's fee Rs. 250.

This petition having been set down this day for being mentioned in the presence of the aforesaid Advocates the Court made the following Order :

Mentioned to-day. The learned Government Pleader explained that the import of coffee machines which form the subject-matter of W.P. No. 216 of 1958 is now prohibited. In view of that W.P. No. 216 of 1958 will stand dismissed. No costs in that.

R.M. —— *Rule absolute.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

Deptylal, Lessee, Coronation Talkies, Ootacamund, by Power of Attorney Agent, Ramaswamy .. *Petitioner**

v.

The Collector of Nilgiris as the Managing Officer, under Act XLIV of 1954, Ootacamund .. *Respondent.*

Displaced Persons (Compensation and Rehabilitation) Act (XLIV of 1954), section 29—Applicability—"Transfer"—What amounts to—Estoppel—Conduct—Party making representations to authority and persuading him to desist from action for eviction under law—Effect of—Constitution of India (1950), Article 226—Pleadings —Duty of applicant—Disclosure of facts.

Property dealt with under section 29 of the Displaced Persons (Compensation and Rehabilitation) Act, 1954, cannot be held to have been transferred to the purchaser unless and until a sale certificate has been actually issued in his favour, though the sale to him has been confirmed. It cannot be said that because a sale certificate might be issued as a matter of course, there would be a transfer taking effect from the date of the sale or auction.

A binding contract for the sale of the property in favour of the purchaser or bidder comes into existence on the approval of the bid by the Settlement Commissioner ; but a " transfer " of the property within the meaning of section 29 takes place only on the issue of the sale certificate. Till then there can be no transfer and section 29 will not apply. S. C. Civil Appeal No. 406 of 1956, followed.

Where, under the law, a competent authority has the right to cancel an allotment or to terminate a lease of any evacuee property and to eject the allotee or lessee from that property, if necessary, by force, but the lessee or allottee makes representations to that authority and persuades him to desist from taking action and ejecting him, which that authority has a right to do, and which he certainly would have done but for the representations made to him by the lessee or allottee, the latter cannot be subsequently allowed to go back upon his representations. He cannot be heard to say that he is not bound by the orders of the authority. He is, by his conduct, estopped from contending that he is not bound by the orders and taking up a different line.

A party invoking the special jurisdiction of the High Court under Article 226 of the Constitution is bound to make a full and true disclosure of all relevant facts. If the applicant has not been as

*W.P. No. 76 of 1958. 4th April, 1958.
(14th Chaitra, 1880—Saka.)

frank and candid as he is under a duty to be, but is found to have suppressed material facts relevant to the issues involved and to have made misleading allegations, he is disentitled to any relief from the Court on that ground alone.

Rex v. *Kensington Income-tax Commissioners, Princess Edmond De Polignac. Ex parte*, L.R. (1917) 1 K.B 486 and *Marappa Gounder* v. *Central Road Traffic Board*, (1956) 1 M.L.J. 324, followed.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in R.C.B. 5 No. 19405 of 1957 on the file of the Collector of Nilgiris at Ootacamund, and quash the order, dated 24th January, 1958 made therein.

R. Gopalaswami Ayyangar, for Petitioner.

The Government Pleader (*B. V. Viswanatha Ayyar*), for Respondent.

The Court made the following

ORDER.—This is a petition for the issue of an appropriate writ to quash the order of the Collector of Nilgiris directing the eviction of the petitioner from certain premises in Ootacamund.

The property described in the proceedings as Coronation Talkies belonged to an evacuee who has gone away to Pakistan. This property includes a cinema theatre, three residential rooms and an office. In exercise of the powers conferred on them under Central Act XLIV of 1954, the officers concerned gave a lease of this portion to the petitioner in 1951 for a period of two years. The lease was renewed from time to time till 1955. In June, 1955, the Regional Settlement Commissioner invited tenders for the sale of the property. He also ordered the eviction of the petitioner. Against the order of eviction the petitioner appealed to the Chief Settlement Commissioner, New Delhi. That Officer heard the petitioner and his counsel and on 1st August, 1957, passed an order dismissing his appeal.

On 30th September, 1957, the property was sold in auction to another evacuee for a sum of Rs. 1,42,000. The purchaser was permitted to set off a sum of Rs. 1,19,606 which was admissible to him in respect of certain claims which he had. For the payment of the balance of Rs. 22,394 he was given 15 days' time counting from 17th October, 1957.

On 19th October, 1957, the petitioner and his counsel appeared before the Chief Settlement Commissioner, New Delhi, and asked that he should be allowed to continue in possession for a few months in order to enable him to comply with obligations he had undertaken to film distributors. The Chief Settlement Commissioner then passed an order granting the petitioner time till 19th January, 1958, to arrange his affairs and to give vacant possession to the Regional Settlement Commissioner. In the course of his order, the Chief Settlement Commissioner expressly stated :

> "He (the petitioner) has also put in a petition accepting the necessity for his eviction but says that he would abide by any order in regard to extending his stay and would peacefully hand over the premises at the expiry of this period."

The Chief Settlement Commissioner also recorded :

> "This extension is not being given because of any right which the petitioner might have but solely to save the petitioner from damage. If the petitioner does not hand over possession peacefully at the expiry of this period, he will be evicted."

After having obtained that period of respite, the petitioner took up the position that he was entitled to remain in possession under section 29 of Act (Central) XLIV of 1954 and wrote to that effect to the Collector of Nilgiris. The Collector addressed the Regional Settlement Commissioner, Bombay, and, after obtaining his instructions, wrote on 23rd January, 1958, to the petitioner directing him to hand over possession before 27th January, 1958. He was also warned that if he failed to hand over possession, peacefully he would be ejected by force if necessary. The petitioner appears to have made further representations to the Collector who on 24th January, 1958, modified the order he had previously passed and informed the petitioner that the eviction would take place on 9th February, 1958, unless he obtained orders from

the High Court to the contrary. In these circumstances the petitioner has come to this Court for the issue of a writ to quash the order of the Collector, dated 24th January, 1958.

To complete the statement of facts it is sufficient to add that the sale in favour of the auction-purchaser was confirmed by the appropriate officer; but no sale certificate has so far been issued to him.

Mr. Gopalswamy Ayyangar, the learned advocate for the petitioner, rested his case on section 29 of Act XLIV of 1954. It is sufficient to quote the first two paragraphs of the first sub-section.

"Where any person to whom the provisions of this section apply, is in lawful possession of any immovable property of the class notified under sub-section (2), which is transferred to another person under the provisions of this Act, then notwithstanding anything contained in any other law, such person shall, without prejudice to any other right which he may have in the property, be deemed to be a tenant of the transferee on the same terms and conditions as to payment of rent or otherwise on which he held the property immediately before the transfer:

Provided that notwithstanding anything contained in any such terms and conditions, no such person shall be liable to be ejected from the property during such period not exceeding two years as may be prescribed in respect of that class of property, except on any of the following grounds, namely:

(a) that he has neither paid nor tendered the whole amount of arrears of rent due after the date of the transfer within one month of the date on which a notice of demand has been served on him by the transferee in the manner provided in section 106 of the Transfer of Property Act, 1882 (IV of 1882);

(b) that he has, without obtaining the consent of the transferee in writing—

(i) sublet or otherwise parted with the possession of the whole or any part of the property; or

(ii) used the property for a purpose other than the purpose for which he was using it immediately before the transfer;

(c) that he has committed any act which is destructive of, or permanently injurious to, the property."

Mr. Gopalaswamy Ayyangar argued that the petitioner is a person to whom the provisions of this section apply and that such persons are entitled to remain on the property for a period of two years from the date of its transfer provided he was in lawful possession of the property at the time it was transferred. So long as he pays or tenders the rent and does not otherwise disentitle himself to relief he is entitled to remain as a tenant of the property on the same terms and conditions as before for two years. According to Mr. Gopalaswamy Ayyangar, therefore, the petitioner is entitled to retain possession of the Coronation Talkies as a lessee for two more years as he was in lawful possession of the property at the time of its transfer.

There are various answers to this. The first one is that though the auction has been confirmed, the property has not yet been transferred to the auction-purchaser since no sale certificate has been issued in his favour. In Civil Appeal No. 406 of 1956 the Supreme Court had to consider a case arising under this very Act and their Lordships held:

"The correct position is that on the approval of the bid by the Settlement Commissioner, a binding contract for the sale of the property to the auction-purchaser comes into existence. Then the provision as to the sale certificate would indicate that only upon the issue of it a transfer of the property takes place. It is for the appellants to show that the property had been transferred.

They have not stated that the sale certificate was issued, nor that the balance of the purchase money had been paid. In those circumstances, it must be held that there has as yet been no transfer of the salt-pans to respondents Nos. 4 and 5. The appellants cannot therefore claim the benefit of section 29 and ask that they should not be evicted."

Dealing with the contention that in any case the sale-certificate would be issued as a matter of course and that once it is issued the transfer would take effect from the date of the auction, their Lordships observed:

"It is enough to say in answer to this contention that assuming it to be right, a point which is by no means obvious and which we do not decide, till it is granted, no transfer with effect from any date whatsoever takes place and none has yet been granted."

In the present case the petitioner does not allege that the sale certificate has been issued. On the other hand, it is clear from the telegram, dated 31st March, 1958

and the post copy thereof produced before me on behalf of the Government that no certificate has been issued. There has therefore been no transfer up to now. On this point alone the petitioner is bound to fail.

Even if it can be assumed that when the auction was confirmed a transfer of the property took place the petitioner would not appear to be entitled to any relief. On 19th October, 1957, while the Chief Settlement Commissioner, New Delhi, passed an order granting extension of time to the petitioner till 19th January, 1958, to wind up his affairs and give vacant possession, the sale had not been confirmed in any sense of the word ; on that date the auction itself had not been confirmed. The order of the Regional Settlement Commissioner, Bombay, dated 17th October, 1957, gave fifteen days time from that date to the auction-purchaser to make up the balance of Rs. 22,394. The order of the Chief Settlement Commissioner contains this passage :

> " He (the petitioner) has also put in a petition accepting the necessity for his eviction but says that he would abide by any order in regard to extending his stay and would peacefully hand over the premises at the expiry of this period."

After having given this assurance the petitioner cannot be heard to say that he is not bound by it. Nor can he be permitted to go back upon it.

I would point out that section 19 of Act XLIV of 1954 gives the officers concerned power to cancel any allotment or to terminate any lease or to amend the terms of any lease or allotment, and, if necessary, to eject persons by force and take possession of any property to which the Act applies. But for the representations which the petitioner made to the Chief Settlement Commissioner, it would have been open to him to summarily dispossess the petitioner and give vacant possession to the auction-purchaser. Having by his representations persuaded the Chief Settlement Commissioner to stay his hand, the petitioner, it seems to me, is estopped from contending that he is not bound to vacate. By this conduct the petitioner had persuaded the Chief Settlement Commissioner to desist from acting in a manner which he had a right to do and in which he would have certainly acted. He cannot now be allowed to take up a different line.

Finally there is another point. A person invoking the special jurisdiction of this Court is bound to make a full and true disclosure of all relevant facts. In *Rex* v. *Kensington Income-tax Commissioners, Princess Edmond De Polignac, Ex parte*[1], Reading, C.J., observed :

> " Where an *ex parte* application has been made to this Court for a rule *nisi* or other process, if the Court comes to the conclusion that the affidavit in support of the application was not candid and did not fairly state the facts, but stated them in such a way as to mislead the Court as to the true facts, the Court ought, for its own protection and to prevent an abuse of its process, to refuse to proceed any further with the examination of the merits. This is a power inherent in the Court, but one which should only be used in cases which bring conviction to the mind of the Court that it has been deceived. Before coming to this conclusion a careful examination will be made of the facts as they are and as they have been stated in the applicant's affidavit and everything will be heard that can be urged to influence the view of the Court when it reads the affidavit and knows the true facts. But if the result of this examination and hearing is to leave no doubt that the Court has been deceived, then it will refuse to hear anything further from the applicant in a proceeding which has only been set in motion by means of a misleading affidavit."

This case has been approved and followed in later decisions of the English Courts. It has also been approved in this Court, *viz.*, *Marappa Gounder* v. *Central R.T. Board.*[2]

In the present case it cannot possibly be said that the petitioner was as frank and candid as he was under a duty to have been. He did not say in his affidavit that the Regional Settlement Commissioner had ordered his eviction. He did not say that he had gone up in appeal and that he and his counsel had been heard at length and that an order had been passed on 1st August, 1957, dismissing his appeal. The averments in paragraph 2 of the affidavit produce the impression that all that happened was that an application of the petitioner that the property might be allotted to him in satisfaction of his claim was not accepted and that the appeal therefore had been dismissed. In that affidavit the petitioner also suppressed the fact that he

1. L.R. (1917) 1 K.B. 486. 2. (1956) 1 M.L.J. 324.

had put in a petition before the Chief Settlement Commissioner "accepting the necessity for his eviction" and also promising that "he would abide by any order in regard to extending his stay and would peacefully hand over the premises at the expiry of this period."

If these two facts had been brought to my notice, I am not at all sure that I would have admitted the writ petition, and certainly, I would not have granted any interim stay. The petitioner would be disqualified on this ground also.

In the result, this Writ Petition is dismissed with costs. Advocates fee Rs. 250.

P.R.N. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Ramaswami Goundar .. *Appellant**

v.

Muthuvel Goundar and another .. *Respondents.*

Civil Procedure Code (V of 1908), Order 21, rule 66 and section 47—Defect in service of sale notice—Petition for setting aside sale—Second Appeal—If lies.

Whenever there is a defect in the service of a sale notice under Order 21, rule 66, Civil Procedure Code and the petition for setting aside the sale relies on it also and puts in section 47, Civil Procedure Code, a Second Appeal will lie.

Appeal against the Order of the Court of the Subordinate Judge of Dindgul, dated 15th December, 1954 and made in C.M.A. No. 6 of 1954 preferred against the Order of the Court of the District Munsif of Dindigul, in E.A. No. 222 of 1952 in E.P. No. 381 of 1951 in O.S. No. 244 of 1949.

K. S. Naidu, for Appellant.

V. C. Viraraghavan, for first Respondent.

The Court made the following

ORDER.—This is an appeal by one Ramaswami Goundar, a judgment-debtor in O.S. No. 244 of 1949 on the file of the District Munsif, Dindigul, against the judgment and decree of the Subordinate Judge, Dindigul, in C.M.A. No. 6 of 1953 reversing the order of the District Munsif, Dindigul, in E.A. No. 222 of 1952, in E.P. No. 381 of 1951, in O.S. No 244 of 1949, allowing an application of this appellant under Order 21, rule 90 and section 47, Civil Procedure Code and setting aside the sale held on 2nd January, 1952, of two kulis and odd of land belonging to the appellant, and charged with a maintenance of Rs. 60 per year, in favour of his setp-mother Savadammal, the decree-holder. The facts were briefly these.

In O.S. No. 244 of 1949, Savadammal got a maintenance decree for Rs. 5 per month against this appellant, and that amount was charged on a house site and two kulis and odd of land valued in the plaint at Rs. 350, but really worth much more. Savadammal was also allowed to put up a shed on the vacant site and reside therein. That is the house site charged with the maintenance. She was also allowed to recover Rs. 70-13-0 as the consolidated costs from an amount in Court. The appellant did not pay the maintenance amount. So Savadammal, aided by her relative, the present auction-purchaser Muthuvel Goundar, took steps, and E. P. No. 381 of 1951 was filed for recovering the arrears of Rs. 137-6-0 due by then. The two kulis and odd of lands were brought to sale. The notice under Order 21, rule 66, Civil Procedure Code, was, according to the appellant, not served on him and a false endorsement that he refused the notice was procured by Savadammal and Muthuvel with the aid of the process-server. The tom-tom too was not done. The result was that the appellant did not know that his properties were being brought to sale and actually only one bidder bid at the Court-

* A.A.A.O. No. 50 of 1955. 4th April, 1958. (14th Chaitra 1880—Saka).

sale, namely, Muthuvel, the relative of Savadammal, and the man who had attested the false endorsement of refusal of the notice under Order 21, rule 66. I may mention here that the appellant's contention was that the property brought to sale was worth Rs. 4,000 and was got by Savadammal and Muthuvel falsely valued at Rs. 950 by an amin sent by Court. Muthuvel was the only bidder, and he bid for just a rupee above the upset price fixed by the Court on the amin's valuation. The sale was knocked down in Muthuvel's name, and Muthuvel obtained an order for delivery. It is at this stage of delivery, on 1st April, 1952, to Muthuvel, that the appellant says he came to know of the sale of his land. He therefore filed an application under Order 21, rule 90 and section 47, Civil Procedure Code, for setting aside the sale on the ground of fraud in publishing and conducting the sale.

The learned District Munsif, Dindigul, after discussing the prevaricatory evidence of the process-server and the attestor, of the alleged refusal of sale notice by the appellant, held that the alleged refusal was false, and that the notice was not really tendered to, or refused by, the appellant. Discussing the contradictory evidence regarding the tom-toming, and acting on the admission of Suppan Madari, P.W. 3, that he did not really do any tom-toming, he held that there was no proclamation of sale by tom-tom also. He also held that the auction-purchaser Muthuvel and the plaintiff Savadammal had conspired together with the process-server and others and procured false return of the refusal of the sale notice, and effectively kept the appellant from knowledge of the sale. He held further that the lands sold for Rs. 951 would be worth at least Rs. 3,500, as stated by the karnam, and possibly Rs. 4,000 as stated by the village munsif and the appellant himself. So, he held that there were material irregularities resulting in substantial injury, and set aside the sale. He held that limitation would not operate, as the petition had been made within thirty days of the date of the discovery of the fraud. So he allowed the petition with costs.

The auction-purchaser Muthuvel took the matter on Appeal. The Subordinate Judge, Dindigul, held after once again discussing the evidence, that the sufficiency of the service of the sale notice on the appellant was not proved, though he was not prepared to say that the process-server had not gone to the village at all. Discussing again the contradictory evidence of Suppan Madari, P.W. 3, regarding the tom-tom, he considered that there was tom-toming believing one portion of that man's evidence. He was also of opinion that as the land sold had been bought by the appellant himself for Rs. 900, its sale for Rs. 951 to the auction-purchaser Muthuvel could not be said to be for a low price or to have caused any substantial injury. Finally, he held that there was no adequate proof of material irregularity or substantial injury consequent on it, and allowed the appeal with costs throughout, setting aside the orders of the learned District Munsif. Hence this C.M.S.A.

I have perused the records, and heard the learned counsel on both sides. Mr. K.S.Naidu, for the appellant, and Mr. V.C. Veeraraghavan for the auction-purchaser, argued the case fully and fairly. It is obvious that, in the light of the contradictory evidence, the conclusions of both the District Munsif, one way, and of the Subordinate Judge, the opposite way, can be supported on portions of the evidence. Suppan Madari, P.W. 3, supports the appellant's case in chief-examination, and the auction-purchaser's case in parts of the cross-examination. The fact also remains that, though the lands were sold for Rs. 951 and had been bought for Rs. 900, there had been great appreciation of land values since the purchase. Against that must be set the fact that the sale to the auction-purchaser was subject to the maintenance charge of Rs. 60 per year in favour of Savadammal. That maintenance charge must be held to amount to a capitalised sum of Rs. 1,200. So the real price paid by the auction-purchaser Muthuvel was Rs. 2,151. This will take away much of the force of the argument of Mr. Naidu that the land was sold for a song. Still, there are circumstances enough to enable me to interfere with the judgment and decree of the lower appellate Court, and pass in its stead an order equitable to both sides.

Before doing that, I shall deal with the preliminary objection of Mr. V. C. Veeraraghavan that no Second Appeal would lie in this case. The argument cannot be sustained. As Mr. K. S. Naidu rightly pointed out, wherever there is a defect in the service of a sale notice under Order 21, rule 66, Civil Procedure Code and the petition for setting aside the sale relies on it also and puts in section 47, Civil Procedure Code, a Second Appeal will lie, as held by single Judges of this Court in *Venkataswami* v. *Nagayya*[1] and *Viswanatha* v. *Murugappan*[2], and by a Bench of this Court in *Meyyappan* v. *Sellappa*[3]. It is clear to me that a Second Appeal would lie in cases like these, and, after seeing the above rulings, Mr. Veeraraghavan also does not persist in his contentions.

Now we come to the merits of the case. In my opinion the appellant was not willing to pay any maintenance to the respondent till the Execution Petition was filed, despite repeated requests and demands. He thought he could twist his fingers at the widow, Savadammal and forget that Savadammal had a formidable ally in the auction-purchaser Muthuvel. Muthuvel was more than a match for the appellant. There is little doubt in my mind that the appellant was not really shown the sale notice under Order 21, rule 66, Civil Procedure Code and did not refuse it, and was not aware of the sale of his lands till 1st April, 1952, when the lands were delivered to Muthuvel. Then he rushed with the petition under Order 21, rule 90, Civil Procedure Code, depositing the sale warrant amount in Court in lieu of security. It is not known whether he has withdrawn the sale warrant amount so deposited. Mr. Naidu was not able to give me definite information about this, nor is it known whether the Rs. 951 put into Court by Muthuvel has been withdrawn by the appellant or others. It is also clear that besides the sale warrant amount, the appellant had to pay Rs. 20 more to Savadammal for maintenance at Rs. 5 per month, till 1st April, 1952, the date of delivery. I think that the income from the lands can be easily set off against the maintenance amount of Rs. 60 due to Savadammal every year from 1st April, 1952. So there is no need for *any mesne profits enquiry* till the date of re-delivery to the appellant by me under this decree. I direct the appellant to deposit into the District Munsif's Court, Dindigul, by 3 P.M., on 15th July, 1958, Rs. 75 as consolidated costs in all the Courts to be paid to the auction-purchaser, Muthuvel, another Rs. 20 as maintenance due to Savadammal before 1st April, 1952 and not covered by the sale warrant amount, and the sale warrant amount, if withdrawn by the appellant, and the Rs. 951 deposited by Muthuvel towards his bid, if withdrawn by the appellant. On all these sums being deposited by the said date, I direct the sale to be set aside, and the land delivered back to the appellant, charged with Savadammal's maintenance amount of Rs. 60 from 15th July, 1958, onwards and with no right for past mense profits till 15th July, 1958. If the sale warrant amounts of the bid amount of Muthuvel are still lying in the lower Court, the appellant need not deposit those amounts, and Savadammal and Muthuvel can draw back those amounts. If the appellant fails to deposit the amount as directed above, by 15th July, 1958, the order of the lower appellate Court will stand confirmed, and this C.M.S.A. will stand dismissed without costs. The appellant is free to deposit the above amounts less amounts in Court *earlier* than 15th July, 1958, as requested by Mr. Naidu, in which case the lands will be delivered back to him earlier, but the maintenance charge will also attach to the lands from the date of the earlier delivery.

K.S. *Appeal allowed : Leave refused.*

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1. A.I.R. 1925 Mad. 1142.
2. A.I.R. 1935 Mad. 438.
3. A.I.R. 1930 Mad. 489.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBRAHMANYAM.

T. K. Krishna Iyer .. *Petitioner**

v.

Karur Vysia Bank Ltd., Coimbatore .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), section 7 (3) (a) (ii)—'For purpose of business which he is carrying on'—Preparations for business—When amounts to carrying on business.

It may be that a person who has obtained the necessary licence or purchased the requisite machinery might be said in certain circumstances to be carrying on business within the meaning of section 7 (3) (a) (iii) of the Madras Buildings (Lease and Rent Control) Act so as to enable him to apply under that provision for eviction of a tenant. But merely because a person had done certain business in the past and intends to do similar business in future, he cannot be said to be 'carrying on a business' within the meaning of the section.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the District Court, Coimbatore, dated 30th October, 1956 and made in C.R.P. No. 853 of 1955 (C.M.A. No. 104 of 1954, Sub-Court, Coimbatore, R.C.P. No. 106 of 1954, Court of the House Rent Controller, Coimbatore).

P. S. Srisailam, V. Ratnam and *V. S. Ramakrishnan*, for Petitioner.

R. Desikan, for Respondent.

The Court delivered the following

JUDGMENT.—This is an application to revise the order passed by the learned District Judge, Coimbatore, on 30th October, 1956, in C.R.P. No. 853 of 1955 on his file. The revision petition was filed before the District Judge under section 12 of the Madras Buildings (Lease and Rent Control) Act, 1949.

The building to which these proceedings relate was purchased by the petitioner on 27th July, 1953. At that time, he was conducting a coffee-hotel under the name and style of "Ranjitha Vilas" in a rented building in Coimbatore. He said in his petition filed before the House Rent Controller, Coimbatore City, that he purchased the building "for accommodating this business (of Ranjitha Vilas)". Immediately after purchasing the building, he sent a notice to the respondent, who was in occupation of the building as a tenant, calling on him to surrender vacant possession. The respondent by reply declined to do so. The petitioner thereafter entered into a family settlement with his brother and son, under which the business known as "Ranjitha Vilas" was made over to them. The petitioner, according to him, ceased, on the making of the family settlement, to have any interest in the business known as "Ranjitha Vilas". He then gave a fresh notice calling on the respondent to surrender vacant possession of the building. The respondent declined a second time to surrender possession. The petitioner thereupon instituted in the Court of the House Rent Controller, Coimbatore City, R.C.P. No. 106 of 1954, for eviction of the respondent.

The House Rent Controller held that, if the petitioner were interested in the business known as "Ranjitha Vilas", he would not be entitled to apply for eviction under section 7 (3) (a) (iii) of the Act, and that, on the other hand, if he was not interested in that business, he would not be a person who could be said to be carrying on a business and would, in that event also, not be a person entitled to apply under section 7 (3) (a) (iii) of the Act. That was the only provision of the Act under which eviction was sought. The Controller further held that, because a building which belonged to the petitioner had fallen vacant subsequent to his purchase of this building and because the petitioner leased the other building to some other tenant without attempting to do business in such other building, the petitioner's application could not be said to have been made in good faith. For those reasons, the learned Rent Controller dismissed the petitioner's application for eviction.

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* C.R.P. No. 107 of 1957. 27th January, 1959.
(7th Magha, 1888—Saka).

The petitioner appealed to the Subordinate Judge, Coimbatore. The learned Subordinate Judge differed from the Rent Controller on the question whether the petitioner was entitled to app'y for eviction under section 7 (3) (*a*) (iii) of the Act. The Subordinate Judge held that the petitioner could apply. But he agreed with the Rent Controller that the application had not been made *bona fide*. On that ground, he dismissed the appeal.

The petitioner applied in revision to the District Judge, Coimbatore, under section 12 of the Act. The District Judge held that he could not interfere with the finding of fact recorded by both the lower Courts on the question of good faith and, in that view, dismissed the petition.

Learned counsel for the respondent contends that the District Judge was right in declining to interfere with the finding of fact recorded by the lower Courts on the question of good faith and that, indeed, on the principles laid down in *Sasivarna Thevar* v. *Ponnu*[1], the District Judge would have exceeded his jurisdiction, if he had interfered with the findings of facts recorded by the Rent Controller and the Appellate Authority on the question of good faith.

It is unnecessary, in the view that I take on the maintainability of the petition, that I express any opinion on the finding recorded by the Rent Controller and Appellate Authority on the question of good faith. I hold that, on the facts stated in the petition before the Rent Controller, the application was not maintainable.

The facts as stated in the petition are these. The petitioner purchased the building in order that he might conduct in that building the business, which he had till then been conducting under the name and style of "Ranjitha Vilas" in a rented building. After he found that he could not acquire possession of this building for conducting the business known as "Ranjitha Vilas", he entered into a family settlement with his brother and his (petitioner's) son, under which the business became the exclusive property of the brother and the son.

It is unnecessary to read any sinister purpose behind that settlement. We may assume that it was a settlement entered into in good faith for reasons properly pertaining to the family. But it is clear that, by reason of the settlement, the petitioner ceased to have any interest in the business, as effectively as if the business had been sold away in Court auction in execution of a decree which some creditor had obtained against the petitioner. After the petitioner ceased to have any interest in the business, he desired to start a business of his own as a coffee hotel proprietor. He had been a coffee hotel proprietor all his life and had the skill and experience needed for starting and conducting such business. He owned a building which he had purchased about six months earlier with a view to conduct in it the business known as "Ranjitha Vilas". Since that business had ceased to be his and since he desired to start a new business of the same kind, he decided that he would start the business in that building which belonged to him. On that decision being made, he asked the respondent to vacate and surrender vacant possession. The respondent declined. The question is whether, on these facts, the petitioner is entitled to maintain an application under section 7 (3) (*a*) (iii) of the Act.

Section 7 (3) (*a*) (iii) entitles the owner of a non-residential building to apply for eviction of the tenant in occupation of the building.

> "If the owner is not occupying for purposes of a business which he is carrying on, a non-residential building in the city, town or village concerned which is his own or to the possession of which he is entitled."

So far as the facts stated above are concerned, the question for decision revolves round the phrase "in a business which he is carrying on". Was the petitioner carrying on a business as the proprietor or Manager of a Coffee-hotel on the date on which he presented the application for eviction to the House Rent Controller?

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1. (1957) 1 M.L.J. 158.

Section 7 (3) (*a*) (iii) of the Act would obviously apply to a case where a person is conducting a business in a building, which is not his and which he is bound to vacate under an order or decree of a Civil Court or other authority. In such a case, if he is the owner of another building, he would be entitled to call on the tenant in occupation of such other building to vacate it in order that he (the landlord) may continue to conduct that business in such other building. The section would also apply to a case where a person who carries on a business in a building finds that building inadequate for the installation of additional equipment and machinery necessary for the business and, for that reason, seeks the eviction of a tenant who is in possession of the landlord's own building elsewhere. (Please see *Nagamanickam Chettiar* v. *Nallakanna Servai*[1]). Those are cases plainly within the terms of the section, where the person seeking eviction is at the time of the application for eviction, carrying on a business in a building. Those are cases in which business is being carried on in a manner which he who runs may see. But the authorities hold that the expression " carrying on a business " applies also to cases where the activities which are held to constitute "carrying on a business" are not so apparent to a passer-by. One such case came up for consideration before Ramaswami, J., in *Kesavan Nair* v. *Babu Naidu*[2]. In that case, the person who was seeking eviction had constructed an automobile factory in Thiruvottiyur High Road at Tondiarpet at a cost of six or seven lakhs of rupees. The machinery had been shifted to the building from Kozhikode. There was a small hutment in front of the building, which had to be removed before the Corporation of Madras would issue a licence for running the factory. The owner of the factory applied for eviction of the tenant in occupation of the hutment. The tenant pleaded that the landlord was not carrying on a business. The learned Judge held, in effect, that it was not necessary, in order that the owner of the factory may be said to be carrying on a business, that the factory should have gone into production. In the learned Judge's words

> " where, in pursuance of a business venture a person has been performing several acts like erecting the building for the factory, shifting machinery from one place to another and applying for licence to the concerned authority, etc., the person is deemed to be 'carrying on the business' and it cannot be said that he only intends to carry on business".

A case slightly different on the facts but calling for the application of the same principle was considered by Viswanatha Sastri, J., in *Venkataswami & Sons* v. *Virabadraswami*[3]. In that case, a person who was doing wholesale business in cloth wished to add to it retail business. He had obtained the necessary licence and quota for carrying on a retail business and all that he had to do was to remove the cloth from his wholesale shop into the retail shop and begin to sell the cloth. The learned Judge held that he had started his business operations and that he could be said to be carrying on a business within the meaning of the expression in section 7 (3) (*a*) (iii). That ruling has been followed by Balakrishna Ayyar, J., in *Azimudeen Sahib* v. *Rangaswami Pillai*[4]. That case, if I may say so with respect, marks the limit to which the principle of these decisions may be extended. In the case before Balakrishna Ayyar, J., the petitioner-landlord was the owner of premises which were in the possession of a tenant. The landlord sought to evict the tenant on the ground that he wanted them to carry on a business of his own. He wanted the premises in order that he might trade in mill cloth and stated that he had obtained a licence for the purpose from the appropriate authorities. The learned Judge held that the fact that the landlord had obtained a licence brought him within the ambit of the expression " a person who was carrying on a business."

In the case before us, there is no allegation, except that the petitioner had purchased this building in 1957 for the purpose of what he describes as "accommodating the business" which he was then carrying on under the name of 'Ranjitha Vilas" that he had done any act in the way of carrying on or preparing for carrying on a business as hotel proprietor on the date on which he filed the application. He said expressly that he had to start a business of his own and that for that purpose he wanted the building. It is true that the avocation of hotel proprietor was with him

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1. (1957) 1 M.L.J. 182.
2. (1954) 2 M.L.J. 149.
3. (1955) An. W.R. 695.
4. (1958) 2 M.L.J. 389.

an old avocation and that nothing was more natural than that he should want to become a hotel propreitor again. But that would not render him, on the date on which he made the application, a person who was carrying on a business as hotel proprietor. He was on that date a person who had done business in the past as a hotel proprietor and who was intending to do business in the future as a hotel proprietor. Such a person is not, in my opinion, a person who is carrying on a business. To hold otherwise would be to delete from section 7 (3) (*a*) (iii) the words "which he is carrying on", a function which the Court is powerless to perform. It is true that the petitioner needed the building for the purpose of a business. But it is not correct to say that he needed it for the purpose of a business which he was carrying on. On the allegations made in the petition, the petitioner was not entitled to apply for relief under section 7 (3) (*a*) (iii) of the Act.

This petition is dismissed with costs.

R.M. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

Kothandarama Gramani .. *Appellant**

v.

Sellammal and others .. *Respondents.*

Civil Procedure Code (V of 1908), *section* 11, Explanation *VI—Right claimed in prior suit on behalf of joint family—Subsequent suit by the son of a coparcener (party to the prior suit)—Negligence in the conduct of prior suit—Bar of* res judicata.

Where the prior suit was on behalf of the family in regard to the joint family rights a subsequent uit by the son of a coparcener who was a party to the prior suit, for the same claim would be barred by *res judicata* under *Explanation* VI to section 11, Civil Procedure Code.

Even otherwise the son will be barred by *res judicata* because his father was a party to the suit and he should be deemed to have been completely represented in that suit.

Negligence or gross negligence in the conduct of the previous suit would not take the subsequent suit out of the bar of *res judicata* contained in the mandatory provisions of section 11, Civil Procedure Code.

Appeal against the Decree of the District Court of South Arcot, in Original Suit No. 43 of 1953.

S. V. Venkatasubramaniam, for Appellant.

N. R. Raghavachariar and *V. C. Srikumar*, for First Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal against the decree and judgment of the District Judge of South Arcot at Cuddalore in O.S. No. 43 of 1953 dismissing the appellant's suit for a declaration that a settlement deed executed by his grandfather Varadappa in favour of his second wife Sellammal, the first respondent in the appeal, was void and not binding on the appellant. Varadappa who owned considerable properties was survived by his second wife Sellammal and 4 sons, respondents 2 to 5 to this appeal. Varadappa died in the year 1950. Prior to his death he executed a deed of settlement Exhibit B-1 in favour of the first respondent giving her an interest for life in 36 acres of land. The sons of Varadappa were evidently not pleased with the settlement. They tried to trespass on the properties settled upon their step-mother. Thereupon the first respondent filed O.S. No. 113 of 1946 on the file of the District Munsif's Court, Tindivanam, for a declaration of her right to the properties under the settlement and an injunction restraining the defendants to the suit from interfering with her possession. Three out of the four sons of Varadappa were made parties to the suit. The father of the appellant Chinnathambi was the fourth defendant to that suit. The defendants contested the suit on the ground that the properties were

* Appeal No. 11 of 1955. 26th November, 1958. (5th Agrahayana, 1880—Saka).

joint family properties or at least jointly acquired properties and that Varadappa could not therefore validily make a settlement in favour of the first respondent. Varadappa who was alive at the time of the suit was examined as the first witness on the side of the plaintiff in that suit. He supported the claim of the first respondent. The suit was in substance a claim by the first respondent against the rest of the members of the family putting forward the right of Varadappa to execute the settlement deed on the basis that the property was Varadappa's self-acquired property or that even otherwise was valid on the footing that as the father of a joint Hindu family he was entitled to make a reasonable provision for the maintenance of his second wife. The defence was common to all the defendants. They set up the title in the family and contested the claim. The District Munsif held that the properties settled were self-acquired properties of Varadappa and that even if it were held to be joint family properties the settlement was a reasonable provision for the maintenance of the second wife having regard to the extent of the properties owned by the family. In that view he decreed the first respondent's claim.

An appeal was taken to the Subordinate Judge of Cuddalore against the decree of the District Munsif. The learned Subordinate Judge affirmed the finding of the trial Court that the properties were self-acquired. But he held that the properties should be deemed to have been blended with joint family properties and therefore part of coparcenary property. In that view the learned Subordinate Judge allowed the appeal and dismissed the suit.

A Second Appeal was taken to this Court against the decree of the appellate Court. This Court set aside the decree of the Subordinate Judge on the ground that the plea of blending of self-acquired property with the other joint family property was not open to the defendants as they had not raised it in the trial Court. This Court therefore remanded the appeal for a further consideration by the Subordinate Judge on the other questions involved in this case namely whether the joint family properties were jointly acquired by the father and his sons and whether even if the properties were held to be joint family properties, provision made under Exhibit B-1 in favour of the settlee could be deemed to be reasonable and proper one in the circumstances of the case. The learned Subordinate Judge held in favour of the first respondent on both the points. He held that the properties were not joint family properties. He also held that Exhibit B-1 was valid and binding upon the members of the family. The result was that the decree of the trial Court was confirmed. A Second Appeal is stated to have been filed on behalf of the contesting defendants but that was rejected under Order 41, rule 11, Civil Procedure Code.

The appellant who is the son of the fourth defendant to the previous suit has thereupon filed the present suit for a declaration that the settlement deed, dated 5th November, 1939, executed by Varadappa in favour of the first respondent was not valid and binding on him and praying for cancellation of the same. He impleaded to the suit not merely the first respondent but his father and uncles who are respondents 2 to 5 to the present appeal. The fifth respondent who is the youngest son of Varadappa contested the suit along with the first defendant. He was not made a party to the previous suit as evidently he did not contest the settlement deed. The contesting defendants raised several pleas as to the maintainablity of the suit. Other defendants were *ex parte*.

The following issues were framed in the case:

(1) Whether the suit is barred by *res judicata* by the decree in Original Suit No. 113 of 1946 and appeal therefrom.

(2) Whether the properties in the settlement are the joint family properties of plaintiff and defendants 2 to 5.

(3) Whether the settlement deed has not been acted upon.

(4) Whether the suit is in time.

(5) Whether the suit for declaration is maintainable.

(6) To what relief, if any, is plaintiff entitled ?

(7) Whether the father and uncles of the plaintiff have been grossly negligent in conducting Original Suit No. 113 of 1946 on the file of Tindivanam District Munsif's Court.

The District Judge took up for trial issues 1 and 7. He came to the conclusion that the present suit was barred by *res judicata* by reason of the decree in O.S. No. 113 of 1946 and the appeal therefrom. On that finding he dismissed the suit. The plaintiff has thereupon filed the present appeal.

The case for the plaintiff in regard to the question involved in the present appeal is that the decision in the previous suit could not operate as *res judicata* as the defendants therein failed to take an obvious plea that was open to them. That plea, according to him, was that the properties though they were acquired by Varadappa they should be held to be treated as joint family properties by him and therefore they lost their character as self-acquired properties in which even the acquirer Varadappa could not make a settlement like the one under Exhibit B-1. He therefore contended that the present suit by the son of the fourth defendant therein is maintainable as the conduct of the previous suit is vitiated by the negligence of the contesting defendants thereto.

Mr. S. V. Venkatasubramaniam the learned advocate for the appellant has referred me to the decision in *Effuah Amissah* v. *Effuah Krabah*[1]. In that case it was held that an action by or on behalf of a family may result in *res judicata*, but such an action, if it were to bind absent or future members of the family, must be so constituted according to the local rules of procedure or by a representation order or in some other way that all such members can be regarded as represented before the Court. That was a case that went up to the Privy Council from Gold Coast Colony. We do not know the rules of procedure obtaining in the Gold Coast. It is not therefore possible to apply the principle of the decision of that case to our country where we are governed by the Code of Civil Procedure. *Explanation* VI to section 11 of Civil Procedure Code, says :

"Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purpose of this section be deemed to claim under the persons so litigating ".

It is not stated by Mr. Venkatasubramaniam that there has been any fraud in the conduct of the previous litigation nor can it be said that there was any lack of *bona fides*. The only complaint now made is that there has been negligence in the conduct of the previous litigation. That the previous litigation was on behalf of the members of the family would be clear from the nature of the defence that was put up in that case. The defendants to that action asserted not their individual right but their right as members of a joint family. I have already mentioned the fact that the fifth defendant to the present action was not made a party. It can be presumed that the fifth respondent was really one with his father in regard to the validity of Exhibit B-1. Therefore in the previous suit there was on the one side a claim by the father's alienee supported by the fifth respondent setting up his exclusive title which was contested by the other members of the family pleading title in the family. That would certainly amount to litigating on behalf of the family. The learned District Judge was therefore right in holding that *Explanation* VI to section 11, Civil Procedure Code, would apply to the present case.

Mr. Venkatasubramaniam then referred to the decision in *Sundar Lal* v. *Chittarmal*[2]. In that case it was held that the dismissal of suit for redemption of the mortgage of the joint family brought by the father of the joint Hindu family would not be a bar to the subsequent suit for redemption. The principle of this decision cannot however apply having regard to the Full Bench decision of our Court in *Venkatanarayana* v. *Somaraju*[3], where it was held that a Hindu father by virtue of his position as manager of the undivided Hindu family, would have the power to represent the entire family in all transactions relating to the family and that this right of representation applied not merely to suits in connection with immoveable properties but also to other transactions as well. In the present case the matter can be viewed in two ways. First is that respondents 2 to 4 were agitating the previous suit on behalf of

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1. A.I.R. 1936 P.C. 147 (P.C.).
2. (1906) I.L.R. 29 All. 215.
3. (1937) 2 M.L.J. 251: I.L.R. (1937) Mad. 80.

the family in regard to their joint family rights as against the alienee from the father. If that were so the *Explanation* VI to section 11, Civil Procedure Code, would apply and the decision in that suit would be *res judicata*. Even otherwise it can be held that so far as at least the appellant is concerned he will be barred by *res judicata* because his father was a party to the suit and he should be deemed to have been completely represented in that suit.

Mr. S. V. Venkatasubramaniam then contended that as there was negligence in the conduct of the previous suit it should be held that he was entitled as a member of the joint family to agitate his own personal right in a subsequent litigation. The learned advocate argued that where the previous suit was conducted without due care and caution the result of that suit could not affect persons who were not *eo nomine* parties to the action. This statement of the law cannot be accepted. In *Venkataseshayya* v. *Kotiswara Rao*[1], the Privy Council has held that the provisions of section 11 of the Code of Civil Procedure are mandatory, and the ordinary litigant who claims under one of the parties to the former suit can only avoid its provisions by taking advantage of section 44 of the Indian Evidence Act, which defines with precision the grounds of such avoidance as fraud or collusion, or by showing a want of *bona fides* in the prosecution of the former suit and that is not for the Court to treat negligence, or gross negligence, as fraud or collusion, unless fraud or collusion is the proper inference from the facts. It is not the case of the appellant that there was any fraud or even want of *bona fides* but there was only negligence which amounted to gross negligence in the circumstances of the present case and that gross negligence would entitle him to ignore the previous decision. The Privy Council decision expressly states that even negligence or gross negligence cannot be a ground for setting aside the previous decision binding between the parties to the suit. The matter has been further considered in a decision of a Bench of this Court in *Nagamma Shedthi* v. *Korathu Hengsu*[2]. That was a case whre it was held that in the absence of fraud or collusion a decree obtained by a Karnavan would be binding on the junior members of the family. The same would apply to the present case viewed either on the footing that it was a litigation fought on behalf of the family or on the footing that the appellant herein was represented by his father. Secondly, mere negligence or even gross negligence may not amount to any *mala fide* conduct. Negligence may be negligence by reason of an error of judgment on the facts at the disposal of the litigants. He might in all honesty have decided not to present a particular aspect of a case having regard to the evidence available to him. The mere fact that the case of blending was not put forward by the respondents 2 to 4 in the previous litigation cannot really amount to any negligence or *mala fides*. Further it must be pointed out that the lower Court tried the case on issues 1 and 7. Issue 7 related to the question of negligence. Admittedly evidence was not let in regard to that point. No attempt has been made to produce evidence to show what exactly was the negligence that was attributable to the conduct of the repondents 2 to 4 in the previous litigation. The appellant in order to succeed should have shown that there were materials available which were not taken note of by respondents 2 to 4 for proving the plea of blending in the former litigation. This he failed to do. The only evidence let in on issues 1 and 7 are Exhibits B-1 to B-4. Beyond showing that the plea as to blending was not taken in the previous proceedings the evidence does not show that such a plea was available and that plea was not taken on acount of negligence. I am therfore satisfied that even factually the appellant has not been able to make out any case of negligence on the part of respondents 2 to 4 when they conducted a litigation as stated above. The conclusion of the learned District Judge is therefore correct. This appeal fails and is dismissed with costs.

V.S. *Appeal dismissed.*

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1. (1937) 1 M.L.J. 113 : L.R. 64 I.A. 17 : I.L.R. (1937) Mad. 263 (P.C.).
2. (1949) 2 M.L.J. 413: I.L.R. (1950) Mad. 326.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBRAHMANYAM.

India Coffee and Tea Distributing Co., Ltd., with their Head office at Bombay and carrying on business at Madras with a Branch office at No. 2/21, First Line Beach, Madras .. *Plaintiff**

v.

The State of Madras represented by the Collector of Madras at the Collector's office, 1st Line Beach, G.T., Madras .. *Defendants.*

Madras General Sales Tax Act (IX of 1939), *section* 5 (v)—*Sale of tea for delivery outside the State —' Delivery'—Means physical delivery only.*

The seller put the tea in a steamer in the port of Cochin, took a bill of lading and in appropriate cases, had the goods insured on the buyer's behalf and prepared an invoice and presented the documents at the branch of the National Bank of India at Madras. The Bank pays the price subject to discount in the case of a bill of exchange payable after sight and accepts the documents. The documents are then forwarded to the Bank in the foreign territory, according to the instructions of the buyer and are delivered to the buyer. On the question whether such sales are exempt from the imposition of sales-tax.

Held: The word 'delivery' in section means physical delivery of the tea sold and not delivery effected by documents. The word 'delivery' does not include anything which the law deems to be delivery but is restricted to physical delivery of the tea sold.

The object of the Legislature in enacting section 5 (*v*) *i.e.* the promotion of the export of tea also supports the above construction of the word 'delivery' in the section.

The sales in the above contracts are exempt from taxation.

V. Tyagarajan and *T. V. Balakrishnan*, for Plaintiff in both.

The Additional Government Pleader (*K. Veeraswami*), for the Defendant in both.

The Court delivered the following

JUDGMENT.—Tea was sold by the plaintiff-company to buyers in Europe (inclusive of the United Kingdom) and in Ireland and the United States. The contract, dated 25th October, 1948, in the documents marked today may be regarded as typical of the contracts of sale. The buyers in that contract are Tea Importers Ltd., Dublin. The quantity of tea agreed to be sold had to be shipped to Dublin during November, 1948. The contract terms was F.O.B. Cochin. Payment was guaranteed by an unconfirmed letter of credit at sight to be opened through the Bank of Ireland for advice to National Bank of India Ltd., Madras. The way the contract was performed was for the plaintiff to put the tea in a steamer in the Port of Cochin, take a bill of lading and in, appropriate cases, have the goods insured on the buyer's behalf and prepare an invoice and present the bill of lading, the invoice and the policy of insurance at the branch of the National Bank of India at Madras. The National Bank pays the price subject to discount in the case of a bill of exchange payable after sight and accepts the documents. The documents are then forwarded to the Bank in Dublin, New York, San Francisco or other place in foreign territory, according to the instructions of the particular buyer and are delivered to the buyer. The facts stated above are proved by the documents and are not disputed by either the plaintiff or the State of Madras. On these facts, we have to ascertain whether the sale of tea made under these contracts is exempt from payment of sales-tax under section 5 (v) of the Madras General Sales Tax Act.

Section 5 (v) exempts from taxation the sale of tea "if the sale is for delivery outside the State and delivery is actually so made". So far as the transfer of property in the tea is concerned, this Court at the original trial (presided over by Ramaswami, J.) found that the property in the goods passed to the buyer at Madras. In O.S.A. Nos. 29 and 30 of 1955 preferred by the plaintiff, that finding was not challenged by the learned advocate for the plaintiff-appellant. It is therefore not open to the plaintiff at present to contend that the property in the tea did not pass

* C.S. Nos. 51 and 163 of 1951. 13th November, 1958. (22nd Kartika, 1880-Saka.)

to the buyer at Madras. It follows that he cannot seek to displace any subsidiary finding essentially implied in the finding relating to the passing of property.

The plaintiff's learned counsel said in opening his case at this hearing, that the National Bank of India, Madras, which paid the price or discounted the bill of exchange presented by the plaintiff along with the invoice and the insurance policy, was not acting as the buyer's agent but was acting as the seller's agent—that the bank was discounting his bill of exchange and forwarding his documents to the buyer for acceptance. The purpose of that contention is to enable the plaintiff to prove that title passed not at Madras, where the documents of title were delivered by the plaintiff to the National Bank, but in the foreign country to which the National Bank forwarded the documents of title and where the buyer accepted the documents with a view to take delivery at the appropriate Port. I declined to receive evidence to that effect because I held that the finding that the property in the goods passed to the buyer at Madras is not a finding which is open to reconsideration at this hearing and that consequently evidence intended to prove that the property in the goods passed not at Madras, but in New York, Dublin or other foreign port of consignment, was not admissible.

The only point that remains for consideration is whether the sale that was effected in Madras was for delivery outside the State of Madras and whether delivery was in fact so effected, that is to say, effected outside the State of Madras.

The primary mode in which delivery of goods sold is effected is for the seller actually to place the goods in the hands of the buyer. That may, for convenience, be described as physical or manual delivery. But delivery in the eye of the law may also be effected by other modes. They are specified in section 33 of the Sale of Goods Act, 1930. Section 33 enacts:

"Delivery of goods sold may be made by doing anyting which the parties agree shall be treated as delivery or which has the effect of putting the goods in the possession of the buyer or of any person authorised to hold them on his behalf."

In so far as delivery may be effected under section 33 in a manner other than the placing of the goods by the seller physically into the hands of the buyer, the delivery that is effected may for convenience be described as delivery in law.

The first question that arises for consideration is whether, in the sales in the case before us, there was delivery in the State of Madras. There was no physical delivery of the goods in the State of Madras. The tea was put in a steamer in the Port of Cochin and the tea was delivered in Ports in countries beyond the seas. The question that we have to consider is whether there was delivery in law, of the tea, in Madras. Property in the tea passed to the buyer at Madras by delivery of the documents of title to the National Bank at Madras. That finding implies the finding that the National Bank accepted the documents as the buyers agent. Thereafter, any person to whom the National Bank endorsed the bill of lading became the owner of the goods and the Master of the ship was in possession of the goods on behalf of the buyer. Since carriage by sea was the mode authorised by the contract of sale, the carrier was the person authorised to hold the goods on behalf of the buyer, just as the National Bank in Madras was the agent authorised to pay the price and accept the documents of title. Delivery in law of the tea was, by virtue of section 33, made by the seller in Madras to the buyer's agent and thereby to the buyer, by the delivery of the documents of title, and the carrier became the buyer's agent.

The contract, of which the contract, dated 25th October, 1948, is typical, expressly stated that payment would be made by the buyer through the National Bank at Madras. Therefore transfer of property at Madras was within the contemplation of the parties when they entered into the contract. It follows that delivery in law of the tea at Madras was delivery effected in accordance with the terms of the agreement. Therefore, if the term "delivery" in section 5 (v) of the General Sales Tax Act includes delivery in law and is not restricted to physical delivery of the goods, the assessment of the sales to tax would be correct. On the other hand, if the term

"delivery" in section 5 (v) excludes delivery in law and is restricted to delivery in fact or physical or manual delivery, then the assessment is beyond the jurisdiction of the State and is void.

Delivery may be either manual or physical delivery or may be delivery in law. In deciding whether the word "delivery" in section 5 (v) includes delivery in law, we have to have regard to the objects of the Legislature in enacting section 5 (v). The object obviously was the promotion of the export of tea. The Legislature intended that where tea was exported from the State for being delivered outside the State, the sale which resulted in such export should be exempt from taxation. That object would not be wholly achieved if we hold that delivery of documents of title in the State of Madras would make the sale liable to taxation. It is a rule of construction that general words in a statute admit of indefinite extension or restriction, according to the subject to which they relate, and the scope and object in contemplation (Maxwell on Interpretation of Statutes, 10th edition, page 18). The same rule is thus stated by Craies. General words must be understood as used with reference to the subject-matter in the mind of the Legislature and limited to it. (Craies on Statue Law, 5th edition, page 166). It does not seem reasonable to hold that the Legislature intended a sale where tea grown in Madras was shipped in Cochin for being delivered in Dublin to be liable to tax in the State of Madras if the documents of title were delivered to a Bank at Madras while a similar consignment of tea shipped from the same port to the same destination would be exempt from taxation if the seller took the precaution of having the documents of title delivered to a bank in Quilon or Cochin or some place outside the State of Madras. Subjecting sellers of tea in Madras to handicaps in the matter of the realisation of price of the goods exported to foreign countries is not conducive to the promotion of exports.

The statute exempts from taxation sales of tea for delivery outside the State, that is to say, sales which are made in order that delivery may be effected outside the State. The word "delivery" in that context is deprived of substance if we regard it as other than delivery of the tea sold and construe it as extending to delivery of documents of title relating to the tea. I hold that the word "delivery" in section 5 (v) means physical delivery of the tea sold, and not delivery effected by documents. The word "delivery" does not include anything which the law deems to be delivery but is restricted to physical delivery of the thing sold. It is not disputed that in every one of the sales to which these suits relate the tea was actually delivered in ports in foreign countries.

I find that every one of the sales subject to the assessments complained of in these suits was a sale which was exempt from taxation under section 5 (v) of the Madras General Sales Tax Act.

The parties will file a memo. stating the statistical consequences of the findings recorded in the appeal and in this judgment. Post on 11th November.

V.S. *Orders accordingly.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice*, MR. JUSTICE RAMACHANDRA IYER AND MR. JUSTICE GANAPATIA PILLAI.

Muppudathi Pillai ... *Appellant**

v.

Krishnaswami Pillai and others ... *Respondents.*

Specific Relief Act (I of 1877), sections 39 and 41—Scope and applicability.

Section 39 of the Specific Relief Act embodies the principles of *quia timet* actions in which a party is allowed to anticipate a danger and institute a suit to cancel a document. Three conditions are requisite for the exercise of the jurisdiction of the Court under that section : (1) the instrument should be such that it is void or voidable against the plaintiff ; (2) the plaintiff should reasonably apprehend serious injury by the instrument being left outstanding ; and (3) the Court should consider it proper to grant the relief of preventive justice. There could be no reasonable apprehension of any injury to a plaintiff where a third party asserting a hostile title to that of the plaintiff creates a document. To such cases section 39 could have no application and consequently the Courts have no jurisdiction under section 41 of the Act to direct payment of compensation.

Venkama Naidu v. *Syed Vilijan Chisty*, (1950) 2 M.L.J. 587 : I.L.R. (1951) Mad. 770 and *Ammani Ammal* v. *Ramaswami Naidu*, (1918) 37 M.L.J. 113, referred.

Appeal against the Decree of the Court of the Subordinate Judge of Ramanathapuram at Madurai in Appeal Suit No. 78 of 1952 preferred against the Decree of the Court of the District Munsif of Sattur in Original Suit No. 178 of 1950.

K. Vaitheeswaran, for Appellant.

Messrs. Chetty, Shetty and V. Meenakshisundaram, for Respondents.

The Order of Reference was made by

Krishnaswami Nayudu, J.†—The appeal arises out of a suit to declare the plaintiffs' right to the A Schedule properties and to direct delivery of possession of the same. The 2nd defendant is the appellant. The suit properties originally belonged to one Vinayagam Pillai. The plaintiffs are the sons of Vinayagam Pillai by his first wife. Vinayagam Pillai married a second wife Vellayammal in whose favour he executed a sale deed of these properties on 5th September, 1930. Vellayammal died in 1935 leaving no issue. Vinayagam Pillai died in 1940 leaving the plaintiffs, his undivided sons, and his first wife who is the 5th defendant. On 7th May, 1940, Vellayammal's mother Krishnammal, claiming to be her stridhana heir, sold these properties to one Sankarapandia Thevar and eventually the 2nd defendant puchased them under Exhibit B-4 dated 3rd March, 1945 from the 1st defendant, to whom Sankarapandia Thevar sold the properties in 1944. The question arose as to who would be the lawful heirs of Vellayammal, whether the mother who purported to deal with the properties, or her husband and his heirs, *viz.*, the plaintiffs and the 5th defendant, which again depended on the form of Vellayammal's marriage with Vinayagam Pillai. Both the Courts held that it was in the Brahma form with the result that the mother could not be a stridhana heir, but only the plaintiffs. As Krishnammal had no title to deal with the properties, the sales in favour of the 2nd defendant and others were held to be void and wholly inoperative.

The further point that was raised and considered by the lower Courts and urged before me is as to whether, notwithstanding the void nature of the sale the 2nd defendant is not entitled to be paid any compensation for the amount of consideration which he parted with for the sale of item under Exhibit B-4. The contention of the appellant is that the consideration for the sale was for the purpose of discharging the decree debt due by the plaintiffs' father Vinayagam Pillai in O.S. No. 193 of 1936 on the file of the District Munsif's Court, Sattur, and to raise the attachment of the

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* S.A. No. 1080 of 1953.

25th February, 1959.
(6th Palguna 1880—Saka).
† 18th November, 1955.

properties which were sought to be sold to the 2nd defendant. In view of the plaintiffs having derived benefit by the sale of item 9 in favour of the 2nd defendant, the 2nd defendant claims entitled on equitable grounds to be paid the sum of Rs. 900, which was the consideration which he parted with.

Section 41 of the Specific Relief Act is sought to the aid of the appellant. The section provides :

"On adjudging the cancellation of an instrument, the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require."

As to when cancellation of an instrument may be ordered is provided for in section 39 of the Specific Relief Act, which says :

"Any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable ; and the Court may, in its discretion, so adjudge it and order it to be delivered up and cancelled."

The Courts below held that the sale was an unauthorised dealing with the property by a person who had no title to the property and therefore void and following the decision in *Ammani Ammal* v. *Ramaswami Naidu*[1], the appellant's claim for compensation was negatived.

In *Ammani Ammal* v. *Ramaswami Naidu*[1], the guardian of a minor sold the minor's property as his own property and part of the consideration for the sale went in discharging of debts binding on the minor. The minor after attaining majority sued for a declaration that the sale was not binding on him and sought to recover possession. It was held that he was entitled to recover possession without repaying the debts binding on him discharged from and out of the purchase money and that the alienee was not entitled to be paid the amount of binding debts discharged either under sections 39 and 41 of the Specific Relief Act or under any rule of equity. There was however a mortgage subsisting on the property and binding on the minor which the purchaser paid off. It was held that since the alienee in good faith purchased the property from the guardian and as such purchaser felt himself bound to pay a mortgage charge created by the real owner which charge the plaintiff was himself under an obligation to meet, the alienee was entitled to be subrogated to the rights of the mortgagee in so far as his money went in discharge of the mortgage and the motgage money was directed to be deducted from the amount decreed to the plaintiff for mesne profits. It was also held that the equitable doctrine enunciated in sections 39 and 41 of the Specific Relief Act would not apply for the reason that the suit was not one for cancellation of the document but for recovery of possession, and Napier, J., took the view that there was no need to have the document cancelled and observed:

"This is a suit by the true owner to recover possession of the property. The title adverse to him is not one procured from him or from any one under whom he claims or from any one who purported to convey an interest of his. It seems to me therefore that there can be no necessity for him to apply to have the document cancelled and further that the Court would have no jurisdiction to do so."

The Privy Council decision in *Balwant Singh* v. *R. Clancy*[2] was relied upon. In that case the suit was on a mortgage executed by a minor without disclosing his minority and when the mortgage was sought to be enforced it was held that the mortgage was void and of no effect and was not merely voidable.

Reliance was placed on the decision in *Venkama Naidu* v. *Sayed Vilijan Chisty*[3], where a Mahomedan after attaining majority sued for partition and possession of his share of the properties of his deceased father sold by his mother during his minority, and it was found that the sale was to discharge a mortgage and to pay off a decree-debt of the father, it was held that the circumstances were such that empowered the Court to award compensation to the ailenee under section 41 of the Specific Relief Act. There the suit was for recovery of possession and with reference to the argu-

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1. (1918) 37 M.L.J. 113.
2. (1912) 23 M.L.J. 18 : L.R. 39 I.A. 109 : I.L.R. 34 All. 296 (P.C.).
3. (1950) 2 M.L.J. 587 : I.L.R. (1951) Mad. 770.

ment that the suit not being for cancellation of the instrument the application of section 41 of the Specific Relief Act was not attracted, the Bench took the view that the language of the section was very wide and gave a large discretion to the Court to make an order for compensation if the ends of justice required such compensation to be awarded where the Court adjudged that a deed was void. The decisions on the subject have been reviewed in that case but the Bench decision in *Ammani Ammal* v. *Ramaswami Naidu*[1], however does not appear to have been placed before the learned Judges.

In *Kunhibi* v. *Kalliani Ammal*[2], Wadsworth, J., took the view that the application of the equitable doctrine enunciated in section 41 of the Specific Relief Act does not arise where the suit is not for cancellation. With reference to the observations of Krishnaswami Aiyangar, J., in *Hanumantha Rao* v. *Sitharamayya*[3], raising the question whether section 41 of the Specific Relief Act would not equally apply when it is the defendant who seek to cancel the instrument, Wadsworth, J., observed that it is unnecessary to go into the question for the purpose of the case he was considering where the defendant does not have to ask for the cancellation of the mortgage, but can merely plead that it is a void transaction which he is entitled to ignore. His view was that,

"to hold that the minor as defendant to a suit on a void mortgage is bound to pray for its cancellation and to restore the benefit received, would be to give the mortgagee a right to enforce his void contract by compelling the minor to pray for cancellation : that is to say, the person who has entered into a void contract with some person not authorised to bind the minor would be given a weapon whereby he could force the minor to honour the contract in part"

and the learned Judge held that there is no obligation upon the defendant to compensate either under section 41 of the Specific Relief Act, or on general equitable grounds.

In *Hanumantha Rao* v. *Sitharamayya*[3], to which decision Krishnaswami Aiyangar, J., was a party, the appeal arose out of a suit to set aside a number of sale deeds and section 41 of the Specific Relief Act was held therefore to apply and it was held that

"the statutory discretion vested in the Courts of this country by section 41 of the Specific Relief Act is of wider amplitude than the corresponding rule of equity administered in England, where there is no such statutory counterpart, and once it is found that the requirements of the section are satisfied and there exist circumstances which call for the exercise of the discretion the Court is bound to afford relief without being hampered by reference to the limitations which surround the corresponding rule of equity as administered elsewhere".

The observations of Krishnaswami Aiyangar, J., which were relied upon, were, as observed by Wadsworth, J., *obiter dicta*. In *Hanumantha Rao* v. *Sitaharamayya*[3] also the decision of Sadasiva Aiyar and Napier, JJ., in *Ammani Ammal* v. *Ramaswmi Naidu*[1] does not appear to have been cited or considered.

In the present case, the sum of Rs. 900 has been found to have been paid to discharge the decree in O.S. No. 193 of 1936 obtained against the father of the plaintiffs in pursuance of which the suit property was under attachment. Exhibit B-23 is the extract from the suit register relating to O.S. No. 193 of 1936 on the file of the District Munsif's Court, Sattur. It shows that the attachment of the immovables was ordered and it is seen that one of the immovables attached was the suit property and the plaintiffs were brought on record as the legal representatives of the deceased Vinayagam Pillai, that they applied by pleader and asked for two months' time and that he execution petition was disposed of on 27th October, 1943; but the attachment was allowed to continue. The contention is that in the circumstances where the sale was for the purpose of discharging the binding debt on the minor plaintiffs and the plaintiffs having had the benefit of the payment by the property becoming free from the said attachment, they are liable to recoup the purchaser the amount in respect of which they had the benefit. It appears to me that the doctrine enunciated in section

1. (1918) 37 M.L.J. 113.
2. (1939) 2 M.L.J. 463.
3. (1939) 2 M.L.J. 195: I.L.R. (1939) Mad. 203.

41 of the Specific Relief Act could be applied only when the Court adjudges the cancellation of the instrument, the relief as to concellation being provided in section 39. Chapter V of the Specific Relief Act deals with cancellation of instruments and section 39 deals as to when cancellation may be ordered. Section 40 refers to cases where the Court may direct partial cancellation of the instrument and section 41 provides for reliefs which may be granted consequent on such cancellation. To entitle the appellant to seek relief under section 41, *prima facie* the suit must be one for cancellation of the instrument. There must be a decree directing the cancellation of the instrument, when alone, according to the strict language of section 41 relief by way of compensation could be granted.

In view of the conflict of decisions as to the application of the equitable doctrine statutorily provided for in section 41 of the Specific Relief Act, I am of opinion that the same may be resolved by a Bench or Full Bench, as the Honourable the Chief Justice may decide. The papers may be placed before the Honourable the Chief Justice for orders as to posting.

An argument was advanced that the appellant is entitled to be reimbursed under sections 69 and 70 of the Contract Act. But in the absence of further facts as to whether the suit property alone was the subject-matter of the attachment in O.S. No. 193 of 1936 and whether the payment could be said to be voluntary, it is not possible to consider this argument.

(The Second Appeal in pursuance of the above Order of Reference came on for hearing before the Full Bench (*Rajamannar, C. J., Ramachandra Iyer* and *Ganapatia Pillai, JJ.*).

The Opinion of the Full Bench was expressed by

Ramachandra Iyer, J.—This appeal involves the determination of a question as to the scope of section 41 of the Specific Relief Act.

One Vinayagam Pillai owned the suit properties. He executed a sale of them to his second wife, Vellayammal. She pre-deceased her husband. Her mother, Krishnammal, claiming to be her heir sold the properties, which, ultimately vested in certain alienees of whom the appellant is one. Vinayagam Pillai died leaving behind him his first wife, and respondents 1 and 2, his sons through her. Respondents 1 and 2 filed the suit, out of which this appeal arises, for recovery of possession of the properties from the alienees on the footing that they as the heirs of Vinayagam were entitled to the same. They impugned the binding nature of the sale by their father to Vellayammal and also of Krishnammal's right to convey the suit properties.

The alienees resisted the suit by pleading that Krishnammal was the lawful heir of Vellayammal as according to them the latter's marriage to Vinayagam was in the Asura form. They also pleaded that if Krishnammal's sale were held to be not binding on respondents 1 and 2, they should reimburse the alienees to the extent to which the consideration for the sale went in discharge of the debts of Vinayagam. The appellant was the second defendant to the suit. He claimed that the consideration of Rs. 900 paid by him went in discharge of a decree against Vinayagam and that therefore in equity, the respondents should pay him that amount before possession of the properties were directed to be delivered.

Both the lower Courts found that the respondents 1 and 2 were not born on the date of the conveyance by their father to his second wife, that the marriage between the said two persons was in the Brahma form, and that the former succeeded to the properties left by latter on her death. The appellant, the second defendant to the action, one of the alienees, has filed this second appeal.

Krishnaswami Nayudu, J., who heard the appeal, accepted the finding of the lower Court that the marriage being in the Brahma form, Vinayagam would succeed to the properties left by Vellayammal in preference to her mother. On the alternative claim for repayment of the consideration for the sale, the learned Judge was of the view that the rule enunciated in section 41 of the Specific Relief Act could be applied

only when the Court adjudged cancellation of an instrument in the cases provided for in section 39 of the Specific Relief Act. But he held that there was a conflict between the decisions in *Ammani Ammal* v. *Ramaswami Naidu*[1] and *Venkama Naidu* v. *Sayed Vilijan Chisty*[2], and the appeal was thereupon directed to be posted before us.

The appellant who derives title under Krishnammal acquired no title by the purchase. Krishnammal's claim was adverse to the real owner Vinayagam and the sale by the former could in no sense be on behalf of the latter. It is no doubt true that the price paid by the appellant was utilised for the payment of a decree debt of Vinayagam for which the property sought to be conveyed was attached but that payment was made under the contract with Krishnammal. The claim of the respondents is by virtue of their own title which remained unaffected by the sale deed executed by Krishnammal. That sale was in assertion of a title hostile to Vinayagam and could neither avail against the respondents' title nor cast a cloud on it. The question then is whether in such a sale where the consideration went for the benefit of the owner, the alienee could invoke the provisions of section 41 of the Specific Relief Act as to claim compensation from the owner of the property to the extent to which his moneys went in for his benefit.

In *Ammani Ammal* v. *Ramaswami Naidu*[1], a minor owned the property. His guardian claiming the property to be his own purported to sell the same and part of the consideration for the sale went in discharge of debts binding on the minor. On attaining age of majority the minor sued for a declaration that the sale was not binding on him, and sought to recover possession and mesne profits from the alienee. The sale having been held not to convey a valid title to the alienee, the latter claimed to be paid out the amount of binding debts discharged out of his moneys. The learned Judges held that the alienees would not be entitled to be paid those sums.

Venkama Naidu v. *Sayed Vilijan Chisty*[2], was a case in which a minor co-sharer, a Muhammadan, filed a suit for partition and recovery of possession of certain lands impugning the alienation made by his mother, who could under the personal law be only a *de facto* guardian. Out of the consideration for the sale certain debts binding on the minor were discharged, and the question arose when declaring the sale to be void and not binding on the quandom minor whether the Court had jurisdiction to award compensation to the disappointed alienee under section 41 of the Specific Relief Act. The learned Judges answered the question in the affirmative. Delivering the judgment of the Bench, Viswanatha Sastri, J., observed at page 590 as follows:

> "Section 39 of the Specific Relief Act empowers the Court to adjudge a written instrument void and order its cancellation at the instance of a party who may be injured by the instrument, if left outstanding. That the person seeking cancellation need not himself be a party to the instrumen is shown by *Illustrations* (*b*) and (*c*) to section 39."

The learned Judges held that although the alienation by the *de facto* guardian of a Muhammadan minor was void in law, there was jurisdiction in the Court to award compensation to the alienee to the extent of the consideration utilised for the benefit of the minor under section 41 of the Specific Relief Act.

Krishnaswami Nayudu, J., in his order has pointed out that the learned Judges who decided *Venkama Naidu* v. *Sayed Vilijan Chisty*[2], did not consider the decision in *Ammani Ammal* v. *Ramaswami Naidu*[1], and that there was conflict between the two decisions. We are unable to share this view. In our opinion, there is no conflict between the two decisions aforesaid, though the observations of Viswanatha Sastri, J., extracted above taken out of their context may appear to be a little broadly stated.

In *Nathu* v. *Balwantrao*[3], a Hindu mother sold as her own a property belonging to her minor adopted son. The purchase money was however applied by her in payment of debts for which the adopted son would be liable under the law and thereby he benefited by it. The minor had a guardian of property appointed by Court. The adopted son on attaining majority sued to set aside the alienation. On the

1. (1918) 37 M.L.J. 113.
2. (1950) 2 M.L.J. 587 : I.L.R. (1951) Mad. 770.
3. (1903) I.L.R. 27 Bom. 390.

sale being found to be invalid the alienee claimed compensation in equity. The learned Judges rejected the claim.

In order to appreciate the principle on which the aforesaid decisions are based, it is necessary to refer to the relevant provisions of the Specitc Relief Act. Section 41 of the said Act is contained in Chapter V which deals with the cancellation of the instruments. It runs :

"On adjudging the cancellation of an instrument, the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require."

It is clear from the provisions of the section that the jurisdiction to award compenation would arise when the Court adjudges the cancellation of an instrument. The relief as to cancellation of an instrument is provided for under section 39 of the Act. It becomes, therefore, relevant to consider as to what are the cases which section 39 would apply and whether it would comprehend the case of an instrument executed by a person claiming under a title different from and hostile to the person seeking cancellation. Section 39 states:

"Any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable ; and the Court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.

If the instrument has been registered under the Indian Registration Act the Court shall also send a copy of its decree to the officer in whose office the instrument has been so registered ; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation".

It may be noticed that the above section applies not merely to the case of an instrument which is voidable but also one that is void. Section 35 provides for the case of rescission of voidable contracts. It is evident that section 39 covers not only a case contemplated under section 35, but also a wider field, that is, a case of a void document, which under the law need not be set aside.

The principle is that such documents though not necessary to be set aside may, if left outstanding, be a source of protential mischief. The jurisdiction under section 39 is, therefore, a protective or a preventive one. It is not confined to a case of fraud, mistake, undue influence, etc., and as it has been stated it was to prevent a document to remain as a menace and danger to the party against whom under different circumstances it might have operated. A party against whom a claim under a document might be made is not bound to wait till the document is used against him. If that were so he might be in a disadvantageous position if the impugned document is sought to be used after the evidence attending its execution has disappeared. Section 39 embodies the principle by which he is allowed to anticipate the danger and institute a suit to cancel the document and to deliver it up to him. The principle of the relief is the same as in *quia timet* actions.

Whitley Stockes in The Anglo Indian Codes, Vol. 1, dealing with Chapter V of the Specific Relief Act states at page 934 as follows :

"Chapter V declares that any person against whom a written instrument is void or voidable, who has reasonable apprehension that if left outstanding it may cause him serious injury, may obtain an adjudication that it is void or voidable and an order that it be delivered up and cancelled. The relief extends to a forged instrument, and also to one originally valid but which has subsequently become forged. The chapter applies to cases not infrequent in India, where a party gets possession of a document, on which he might not indeed be able to found a claim in a Court of Justice, but which might give him such *prima facie* right against the other as would expose him to vexatious demands and litigation ".

The learned Author points out that section 39 of the Specific Relief Act was taken for the most part from the Draft New York Civil Code, Articles 1906 and 1098. That principle has been set out in Story on Equity Jurisprudence, English edition (1920) in Article 694, thus :

"It is obvious that the jurisdiction, exercised in cases of this sort, is founded upon the administration of a protective or preventive justice. If, therefore, the instrument was void for matter apparent upon the face of it, there was no call to exercise the jurisdiction, with the possible exception of instruments forming a cloud upon the title to land. The party is relieved upon the principle, as it is technically called *quia timet*; that is, for fear that such agreement, securities, deeds, or other instruments may be vexatiously or injuriously used against him, when the evidence to impeach them may be lost; or that they may now throw a cloud or suspicion over his title or interest ".

The provisions of section 39 make it clear that three conditions are requisite for the exercise of the jurisdiction to cancel an instrument: (1) the instrument is void or voidable against the plaintiff; (2) plaintiff may reasonably apprehend serious injury by the instrument being left outstanding; (3) in the circumstances of the case the Court considers it proper to grant this relief of preventive justice. On the third aspect of the question the English and American authorities hold that where the document is void on its face the Court would not exercise its jurisdiction while it would if it were not so apparent. In India it is a matter entirely for the discretion of the Court.

The question that has to be considered depends on the 1st and 2nd conditions set out above. As the principle is one of potential mischief, by the document remaining outstanding, it stands to reason the executant of the document should be either the plaintiff or a person who can in certain circumstances bind him. It is only then it could be said that the instrument is voidable by or void against him. The second aspect of the matter emphasises that principle. For there can be no apprehension if a mere third party asserting a hostile title creates a document. Thus relief under section 39 would be granted only in respect of an instrument likely to affect the title of the plaintiff and not of an instrument executed by a stranger to that title.

Let us take as example a trespasser purporting to convey the property in his own right and not in the right of the owner. In such a case a mere cancellation of the document would not remove the cloud occasioned by the assertion of a hostile title, as such a document even if cancelled would not remove the assertion of the hostile title. In that case it would be the title that has got to be judicially adjudicated and declared, and a mere cancellation of an instrument would not achieve the object. Section 42 of the Specific Relief Act would apply to such a case. The remedy under section 39 is to remove a cloud upon the title, by removing a potential danger but it does not envisage an adjudication between competing titles. That can relate only to instruments executed or purported to be executed by a party or by any person whoe can bind him in certain circumstances. It is only in such cases that it can be said there is a cloud on his title and an apprehension that if the instrument is left outstanding it may be a source of danger. Such cases may arise in the following circumstances. A party executing the document, or a principal in respect of a document executed by his agent, or a minor in respect of a document executed by his guardian *de jure* or *de facto*, a reversioner in respect of a document executed by the holder of the anterior limited estate, a real owner in respect of a document executed by the benamidar, etc. This right has also been recognised in respect of forged instruments which could be cancelled by a party on whose behalf it is purported to be executed. In all these cases there is no question of a document by a stranger to the title. The title is the same. But in the case of a person asserting hostile title, the source or claim of title is different. It cannot be said to be void against the plaintiff as the term void or voidable implies that but for the vitiating factor it would be binding on him, that is, he was a party to the contract.

There is one other reason for this conclusion. Section 39 empowers the Court after adjudicating the instrument to be void to order the instrument to be delivered up and cancelled. If the sale deed is or purported to have been executed by a party, the instrument on cancellation could be directed to be delivered over to the plaintiff. If on the other hand such an instrument is executed by a trespasser or a person claiming adversely to the plaintiff it not possible to conceive the instrument being delivered over not to the executant but his rival, the plaintiff.

In *Ammani Ammal* v. *Ramaswami Naidu*[1], Napier, J., after referring to the provisions of sections 39 and 41 of the Specific Relief Act observed at page 121:

"To my mind it is clear that there is no necessity to have this document cancelled. The *Illustrations* to section 39 indicate that it is only where a party cannot get his legal remedy without first having the document set aside that he comes within the section. This is a suit by the true owner to recover possession of the party. The title adverse to him is not one procured from him or from any one under whom he claims or from any one who purported to convey an interest of his. It seems to me

1. (1918) 37 M.L.J. 113.

therefore that there can be no necessity for him to apply to have the document cancelled and further that the Court would have no jurisdiction to do so."

We accept this statement of the law. We already referred to a passage in the judgment of Viswanatha Sastri, J., in *Venkama Naidu* v. *Sayed Vilijan Chisty*[1]. There the learned Judge referred to the fact that *Illustrations* (*b*) and (*c*) to section 39 refer to cases where the person seeking cancellation need not himself be a party to the instrument. But it may be noticed that in the cases referred to in those illustrations the title is the same. *Illustration* (*b*) refers to a case of forged instrument. That would be a case where the instrument is purported to be executed on behalf of the plaintiff, and if that instrument were kept outstanding it may be a case of danger to his title. *Illustration* (*c*) is again a case where the vendor after parting with the property grants a lease. In such a case the purchaser would be entitled to have the lease cancelled. Those cases are only illustrations of the proposition that the Court has the power to cancel the sale deed executed or purported to be executed by the plaintiff or persons who could otherwise bind him. The decision in *Venkama Naidu* v. *Sayed Vilijan Chisty*[1], is a case where the sale was executed by a *de facto* guardian of a Muhammadan minor. Such a conveyance would be void in law. But nevertheless the *de facto* guardian purported to act on his behalf, and the deed if left outstanding could cast a cloud upon the title of the plaintiff. The case would obviously come under section 39. The learned Judges in that case have exhaustively referred to the various cases on the subject in support of their conclusion. It is unnecessary to deal with them here beyond stating that all those cases were cases of documents executed either by the minor alleging himself to be a major or by his gardian, *de jure* or *de facto*, but always purporting to act on his behalf. That case would be entirely different from a case of sale by a person asserting a title hostile to that of the plaintiff, as in the cases referred to above namely, *Nathu* v. *Balwanturao*[2] and *Ammani Ammal* v. *Ramaswami Naidu*[3]. It is true that section 39 may apply to persons other than the actual party to the instrument, for instance to the case of an agent selling without authority, or a case where the person commits forgery purporting to sell on behalf of the plaintiff. It is even possible to conceive that a creditor can in certain circumstances impugn the document created by his debtor. In all those cases as pointed out already the title which is sought to be protected is the title of the plaintiff, and not an adjudication as against any rival claimant. *Venkama Naidu* v. *Sayed Vilijan Chisty*[1], related to a case where a document was executed purporting to bind the plaintiff. *Ammani Ammal* v. *Ramaswami Naidu*[3], is a case of the latter category, that is, where a document is executed by a person claiming hostile title. That would not be comprehended by section 39. There is, therefore, no conflict between the decision in *Ammani Ammal* v. *Ramaswami Naidu*[3], and that in *Venkama Naidu* v. *Sayed Vilijan Chisty*.[1]

In our opinion, section 39 will not apply to a case like the present where the sale was executed by a person claiming title adverse to that of Vinayagam Pillai, and therefore, the Court would have no jurisdiction under section 41 to direct payment of compensation by the plaintiff to the appellant before obtaining relief as to possession. To hold otherwise would mean that a mere volunteer who paid the debt of the plaintiff would be able to recover the same.

As the question whether the appellant will be entitled to be paid back his moneys on any principle like salvage lien, unjust enrichment or under the provisions of sections 69 and 70 of the Contract Act has still to be considered before the appeal could be finally disposed of, the appeal will be posted in the usual course for disposal.

Then the Second Appeal came on for final disposel before Ramaswami, J., who delivered the following

JUDGMENT.—This second appeal is preferred against the decree and judgment of the learned Subordinate Judge of Ramanathapuram at Madurai in A.S. No. 78 of 1952, confirming the decree and judgment of the learned District Munsif in O.S. No. 178 of 1950.

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1. (1950) 2 M.L.J. 587 : I.L.R. (1951) Mad 770.
2. (1903) I.L.R. 27 Bom. 390.
3. (1918) 37 M.L.J 113.

The suit properties originally belonged to one Vinayagam Pillai. The plaintiffs are the sons of Vinayagam Pillai by his first wife. Vinayagam Pillai married a second wife Vellayammal in whose favour he executed a sale-deed of these properties on 5th September, 1930. Vellayammal died in 1935 leaving no issue. Vinayagam Pillai died in 1940 leaving the plaintiffs, his undivided sons, and his first wife who is the 5th defendant. On 7th May, 1940, Vellayammal's mother Krishnammal, claiming to be her stridhanam heir, sold these properties to one Sankarapandia Thevar and eventually the 2nd defendant purchased them under Exhibit B-4, dated 3rd March, 1945, from the 1st defendant, to whom Sankarapandia Thevar sold the properties in 1944. Regarding the sale in favour of the second defendant, a suit was filed in pauper form by Krishnaswami Pillai and his minor son, Sundaram Pillai, to declare that the plaint A Schedule properties belong to the plaintiffs and for recovery of possession of the same with future mesne profits.

The suit was based on the question as to who would be the lawful heir of Vellayammal, whether the mother who purported to deal with the properties, or her husband and his heirs, namely, the plaintiffs and the 5th defendant, which again depended on the form of Vellayammal's marriage with Vinayagam Pillai. Both the Courts held that it was in the Brahma form with the result that the mother could not be a stridhana heir, but only the plaintiffs. As Krishnammal had no title to the properties, the sales in favour of the 2nd defendant and others were held to be void and wholly inoperative. This, however, is not the controversy which is the subject-matter before us now.

The present controversy before us is as to whether nothwithstanding the void nature of the sale the 2nd defendant is not entitled to be paid the amount which was utilised for the discharge of the decree debt of Vinayagam in O.S. No. 193 of 1936 on the file of the District Munsif's Court, Sattur. In view of the plaintiffs having derived benefit by the sale of item 9 in favour of the 2nd defendant, the 2nd defendant claims to be entitled on equitable grounds to be paid the sum of Rs. 900 which was the consideration which he parted with.

Both the Courts below did not order refund in setting aside the sale. Therefore, there was a second appeal in this Court before Krishnaswami Nayudu, J. In that second appeal the point concentrated upon was section 41 of the Specific Relief Act. Krishnaswami Nayudu, J., held that there was a conflict of decisions as to the application of section 41 of the Specific Relief Act. Therefore, the following question was formulated for decision by a Full Bench :

"Where the sale was for the purpose of discharging the binding debt on the minor plaintiffs and the plaintiffs having had the benefit of the payment by the property becoming free from the said attachment, are they liable to recoup the purchaser amount in respect of which they had the benefit."

The learned Chief Justice directed the matter to be posted before a Full Bench, and it has been heard by a Full Bench consisting of my Lord, the Chief Justice, Ramachandra Iyer, J., and Ganapatia Pillai, J.

The learned Judges were of opinion that section 39 would not apply to a case like the present one where the sale was executed by a person claiming title adverse to that of Vinayagam Pillai, and therefore, the Court would have no jurisdiction under section 41 to direct payment of compensation by the plaintiff to the appellant before obtaining relief as to possession. To hold otherwise would mean that a mere volunteer who paid the debt of the plaintiff would be able to recover the same.

The learned Judges proceeded further to point out that the question whether the appellant would be entitled to be paid back his moneys on any principle like salvage, unjust enrichment or under the provisions of section 69 and 70 of the Contract Act had still to be considered before the appeal could be finally disposed of, and the learned Chief Justice has directed this appeal to be posted before me.

I have been taken through the records by the learned Advocates on both sides before me. I have not the slightest doubt in coming to the conclusion that this is a case of unjust enrichment, and that the plaintiffs are bound to reimburse the second

defendant in a sum of Rs. 900. In this case all the requirements for granting relief under the doctrine of unjust enrichment stand fully made out. The consideration which the 2nd defendant paid went to avert the sale of the land for the decree debt of Vinayagam Pillai. It stands to reason that when the plaintiffs wanted to take possession of the land, they must pay the debt which the land was bound to satisfy by reason of it being the decree debt of Vinayagam Pillai. It is also seen that the plaintiffs in the execution proceedings have taken time for payment of the amount. Therefore, the plaintiffs cannot be allowed to blow hot and cold and play fast and loose and assume different postures in the course of the same proceedings or even in subsequent proceedings which directly arose from the previous suit.

This doctrine of unjust enrichment has been the subject-matter of three decisions of this Court, namely, *Goolabchand* v. *Miller*[1], *Mahalingam Chettiar* v. *Ramanathan Chettiar*[2], and *Govindarajulu Naidu* v. *S. S. Naidu*[3], wherein I have dealt with the entire case-law and the settled principles in England, America and India and reproduced the following :

"The doctrine of restitution may now be summed up in the language of the American Restatement of the Law of 'Restitution' in Chapter 1, section 1, at page 12 and following :

A person who has unjustly enriched at the expense of another is required to make restitution to the other. A person is enriched if he has received a benefit. A person confers a benefit upon another if he gives to the other possession of or some other interest in money, land, chattels, or choses in action performs services beneficial to or at the request of the other, satisfies a debt or a duty of the other, or in any way adds to the other's security or advantage, saves the other from expenses or loss. The word 'benefits', therefore, denotes any form of advantage....

Even where a person has received a benefit from another he is liable to pay therefor only if the circumstances of its receipts or retention are such that, as between the two persons, it is unjust for him to retain it. The mere fact that a person benefits another is not of itself sufficient to require the other to make restitution therefor....

Ordinarily the benefit to the one and the loss to the other are co-extensive, and the result of the remedies given under the rules stated in the restatement of this subject is to compel the one to surrender the benefit which he has received and thereby to make restitution to the other for the loss which he has suffered....

Where the benefit and loss do not coincide....the amount of recovery is usually limited to the amount by which he has been benefited....

A person who officiously confers a benefit upon another is not entitled to restitution therefor.'

This is certainly not a case of a person who conferred a benefit upon another officiously and is, therefore, not entitled to restitution therefor.

In addition to these three decisions, the learned Advocate, Mr. Vaideeswaran, brings to my notice the decision of the Privy Council in *Govindram Govardhandas Seksaria* v. *State of Gondal*[4], wherein it is laid down :

"The words 'bound by law to pay' in section 69 of the Contract Act do not exclude those obligations of law which arise *inter partes* whether by contract or tort and is not confined only to those public duties which are imposed by statute or general law. They extend to any obligation which is an effective bond in law.

It is not correct to say that a person could not be 'interested in the payment of money' within the meaning of section 69 of the Contract Act unless he was at the same time entitled to some legal interest in the property in respect of which such payment might be made. The words themselves do not require that a person to be interested in a payment should at the same time have a legal proprietary interest in respect of which the payment is made. *S* had become the purchaser of certain mills and was handed over possession on 9th September, 1937. On 29th November, 1937, *S* entered into an agreement by way of sub-sale with a company under which he agreed to sell the mills to the company at the same price as that at which he bought them. Before that date, it was found that large amounts were outstanding in respect of municipal taxes on the mills and in spite of correspondence between the original owners and *S* and the company which purchased from him, the latter Company was forced to pay that sum to avoid legal proceedings for the enforcement of the statutory charge. In a suit by the company and its vendor against the original owners for the recovery of the sum so paid :

Held, the payment made can in no sense be said to be a voluntary one. The company had contracted to buy the mills and they were imminently threatened with a forced sale which would defeat its purchase. No one was disposed to pay the taxes due and so the company paid. To describe it in such circumstances as having made a voluntary payment would involve some misuse of language.

1. (1938) 2 M.L.J. 688.
2. Appeal No. 665 of 1948.
3. (1958) 2 M.L.J. 148.
4. (1950) 2 M.L.J. 1 : L.R. 77 I.A. 156 (P.C.).

The company was also interested in the payment of taxes though the actual sale deed in their favour was executed subsequently."

The net result of this analysis is that the decrees and judgments of the lower Courts have to be modified, and the plaintiffs, before recovering possession of the land, will have to reimburse the 2nd defendant in a sum of Rs. 900. I am providing for interest, because the 2nd defendant had been in enjoyment of the land, and mesne profits and interest can be equated. The decrees and judgments of the lower Courts will stand modified accordingly.

This second appeal is allowed with costs.

R.M. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GANAPATIA PILLAI.

Srinivasalu Naidu .. *Appellant**

v.

S. K. Thangavelu Chettiar .. *Respondent.*

Madras Agriculturists' Relief Act (IV of 1938) and amending Act (XXIII of 1948), section 16—Scaling down under—Applicability—Judgment-debtor applying to set aside the ex parte *decree against him—Application not pressed in view of compromise entered into under which decree-holder gave up a portion of the decree—If estops the judgment-debtor from applying for scaling down the decree.*

The relief of scaling down of a decree under section 16 of the Madras Agriculturists' Relief Act, 1938, is a separate one which could be claimed by a judgment-debtor by a separate application as the provisions came into force only in 1949. The mere fact that the debtor did not apply for the relief at the time of the passing of the decree will not be a bar. This will be so in cases falling both under sub-section (1) or sub-section (2) of the section.

Narayanan Chettiar v. *Annamalai Chettiar*, (1953) 2 M.L.J. 174, held not good law.

Narayanan Chettiar v. *Annamalai Chettiar*, (1959) S.C.J. 788 : (1959) 2 M.L.J. (S.C.) 55 : (1959) 2 An.W.R (S.C.) 55 : A.I.R. 1959 S.C. 275 (S.C.), referred.

The fact that a judgment-debtor who applied for setting aside an *ex parte* decree passed against him did not press the same in lieu of the decree-holder agreeing to give up a certain sum out of the decree does not amount to an estoppel and the judgment-debtor will still be entitled to claim the relief of scaling down the decree under the Act.

Appeal against the Order of the District Court of Chingleput, dated 8th April, 1957 and made in A.S. No. 216 of 1956 preferred against the Order of the Court of the District Munsif of Kancheepuram, dated 7th September, 1956 and made in M.P. No. 461 of 1956 in O.S. No. 318 of 1951.

P. S. Srisailam, for Appellant.

K. Thiruvenkatachari, for Respondent.

The Court delivered the following

JUDGMENT.—This appeal is directed against the appellate order of the District Judge, Chingleput, in A.S. No. 216 of 1956. That appeal was against the order of the District Munsif of Conjeevaram in M.P. No. 461 of 1956 in O.S. No. 318 of 1951. That was an application of the judgment-debtor in a mortgage suit for scaling down the decree debt in accordance with Madras Act IV of 1938. He sought to obtain the relief of scaling down in pursuance of section 16 of the Amending Act XXIII of 1948. This Act came into force only on 25th January, 1949. The District Munsif dismissed the application for scaling down the decree on the ground that the parties had come to a compromise in I.A. No. 15 of 1952 which was an application made by the judgment-debtor to set aside the *ex parte* decree. The agreement alleged was that in consideration of the decree-holder giving up a sum of Rs. 150 from out of the decree amount the judgment-debtor agreed not to pursue his application for setting aside the *ex parte* decree. The learned District Judge has agreed with the District Munsif in this view and has also relied on the decision in

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* A.A.A.O. No. 95 of 1957. 30th March, 1959. (9th Chaitra, 1881—Saka).

Narayanan Chettiar v. *Annamalai Chettiar*[1], for holding that the appellant was not entitled to apply for scaling down the decree debt.

This decision has been reversed by the Supreme Court in *Narayanan Chettiar* v. *Annamalai Chettiar*[2]. Their Lordships of the Supreme Court have pointed out in that case that the relief given by the amending Act is a separate relief which the judgment-debtor was entitled to ask for by a separate application, even though in the case of a decree passed after the coming into force of the amending Act this relief had not been prayed for. It is true in the Supreme Court case the facts fell under section 16 (2) of the Amending Act. That is to say the suit in that case was instituted before the commencement of the amending Act. But the decree passed there had not become final before the commencement of the Amending Act. In this case the suit itself was instituted after the commencement of the amending Act and it consequently falls under section 16 (1). The dictum of the Supreme Court that in cases falling under sub-clause (2) there was no bar of constructive *res judicata* merely because the debtor had not applied for relief when the decree was passed, must, in my opinion, equally apply to a case governed by section 16 (1) because on principle there is no difference between a case falling under sub-clause (1) and the one governed by sub-section (2) of section 16 in the matter of relief granted by the amending Act of 1948. In both the cases the decree was passed after the Act came into force and therefore *Narayanan Chettiar* v. *Annamalai Chettiar*[1], cannot be relied on as good law now.

The point that the judgment debtor consented to his application for setting aside the *ex parte* decree being dismissed on the decree-holder giving up Rs. 150 out of the decree amount does not really touch the question. There can be no estoppel against the statute and if the judgment-debtor is entitled to relief under the amending Act, the learned counsel for the respondent cannot be heard to say that by allowing the application to set aside the *ex parte* decree to be dismissed the judgment-debtor is estopped from claiming relief of scaling down under the amending Act.

The orders of the lower Courts are, therefore, set aside. The District Munsif will restore M.P. No. 461 of 1956 to his file and dispose of it afresh. No costs.

R.M. — *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBRAHMANYAM.

M. R. N. Mahalinga Nadar and another .. *Petitioner**

v.

The Commissioner, H.R. and C.E., Madras and others .. *Respondents.*

Madras Hindu Religious and Charitable Endowments Act (XIX of 1951), *section* 39 (4)—*Scope and applicability—Application to set aside an order appointing non-hereditary trustees—Time limit—Computation.*

An application under section 39 (4) of the Madras Hindu Religious and Charitable Endowments Act, 1951, to set aside an order appointing non-hereditary trustees for a religious institution, could lie only in cases of appointments made avowedly under section 39 (2) of of the Act. That provision has no application to cases where an appointment of non-hereditary trustee is made in purported exercise of the Committee's powers under section 39 (1) or under that section read with section 41 (1) of the Act.

Quaere.—Whether the expression " within thirty days from the receipt of the order " in section 39 (4) of the Act should be construed as equivalent to " knowledge of the order."

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the City Civil Court (Additional Judge), Madras, dated 24th April, 1958 and made in O. P. No. 423 of 1957.

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1. (1953) 2 M.L.J. 174.
2. (1959) 2 M.L.J. (S.C.) 55 : (1959) S.C.J. 788 : (1959) 2 Andh. W.R. (S.C.) 53 : A.I.R. 1959 S.C. 275.

* C.R.P. No. 897 of 1958.

6th January, 1959.
(16th Pausa, 1880—Saka).

V. N. Venkatavaradachari, V. Viraraghavachari and *S. Henri Victor*, for Petitioner.

The Government Pleader (*B. V. Viswanatha Ayyar*) and *T. M. Chinniah Pillai*, for Respondent.

The Court delivered the following

JUDGMENT.—This civil revision petition is preferred against the order passed by the learned Additional Judge of the City Civil Court, on 24th April, 1958, in O.P. No. 423 of 1957 on his file.

In Old Washermanpet there is a temple known as Sri Siva Sundara Vinayagar temple. The Area Committee having jurisdiction under Madras Act XIX of 1951 (The Madras Hindu Religious and Charitable Endowments Act), passed an order on 27th September, 1955, appointing five non-hereditary trustees for the temple. At that time, the Area Committee treated the second petitioner as the person in management of the affairs of the temple, and sent him a copy of the order appointing non-hereditary trustees and asked him to hand over charge of the temple and its affairs to those non-hereditary trustees. The trustees so appointed are respondents 2 to 6. The Commissioner, Hindu Religious and Charitable Endowments, is the first respondent. The petitioners are brothers, the second petitioner being the younger brother of the first.

The order passed by the Area Committee appointing respondents 2 to 6 as non-hereditary trustees of the temple was made in purported exercise of the Committee's powers under section 41 read with section 39 (1) of the Act. Against that order, the petitioners preferred an application to the City Civil Court, praying that the order be set aside. That application was made under section 39 (4) of the Act. Section 39 (4) of the Act is in these terms :

"Where the Commissioner, by order, appoints a non-hereditary trustee or trustees, the hereditary trustee or trustees may, within thirty days of the receipt of the order, file an application to the Court to set aside or modify such order."

The petitioners claimed that the temple was a private temple, that is to say not ' a religious institution ' as the term is defined in the Act. They claimed further that they were the hereditary trustees of the temple. No notice had been given to them to show cause why non-hereditary trustees should not be appointed. They contended that the order appointing non-hereditary trustees was invalid firstly because the Area Committee had no jurisdiction over the temple, which was not a religious institution, and secondly because no order appointing non-hereditary trustees could be made without giving the petitioners an opportunity to show cause why such an order should not be made.

The learned Additional City Civil Judge did not consider or decide the question whether the temple was a public temple, that is to say, whether it was a 'religious institution ' as the term is defined in the Act. He proceeded on the basis that the temple was a religious institution. He held that the first petitioner was the hereditary trustee of the temple. No notice had been given to him by the Area Committee to show cause why non-hereditary trustees should not be appointed. The learned Judge held that the order appointing non-hereditary trustees should be held invalid. On the question whether the application before him was in time the learned Judge held that it was not. On that finding he dismissed the petition.

Section 39 (4) of the Act states that an application to set aside an order appointing non-hereditary trustees should be made within 30 days of the receipt of the order. In this case, a copy of the order had been sent to the second petitioner and he had been asked to hand over charge of the affairs of the temple to the non-heredidary trustees who had been appointed by the Area Committee. But no copy of the order was sent to the first petitioner at all who, according to the learned Judge, was the hereditary trustee of the temple. In regard to the first petitioner the learned Judge held, however, that the expression ' receipt of the order ' should be construed as ' knowledge of the order' and since the learned Judge found that the first petitioner had had knowledge of the order more than thirty days

before he filed the application the Judge held that the application was barred as regards the first petitioner as well.

In the view that I take of the purpose and scope of section 39 (4), it is unnecessary to consider whether the learned Judge was correct in his interpretation of the expression 'receipt of the order' occurring in section 39 (4). I am of the opinion that the application under section 39 (4) was misconceived and that section 39 (4) could not apply at all to the order that was passed by the Area Committee appointing non-hereditary trustees.

Section 41 of the Act read with section 39 (1) empowers the Committee to appoint non-hereditary trustees for a religious institution, which has no hereditary trustees. Section 41 read with section 39 (2) provides for the appointment of non-hereditary trustees for an institution which has a hereditary trustee or trustees. In relation to such an institution non-hereditary trustees could be appointed in the event only of the Committee being satisfied, after giving an opportunity to the hereditary trustee or trustees to show cause, that, in the interests of the efficient administration of the affairs, of the institution non-hereditary trustees should be appointed in addition to the hereditary trustees. The number of non-hereditary trustees to be appointed should be such that the total number of trustees inclusive of the hereditary trustees does not exceed five. In this case the number of non-hereditary trustees appointed was five. That was because the Area Committee proceeded on the basis that there was no hereditary trustee. In my opinion section 39 (4) applies only to the case of appointment of non-hereditary trustees avowedly made under section 39 (2). Section 39 (4) can have no application to a case of appointment of non-hereditary trustees made in purported exercise of the Committee's power under section 41 (1) read with section 39 (1) or of the Commisssioner's power under section 39 (1).

Section 39 (4) refers, it will be seen, to the hereditary trustee or trustees applying to the Court within 30 days of the receipt of the order. That obviously shows that the Legislature contemplated the hereditary trustee or trustees receiving the order appointing non-hereditary trustees so as to enable them to file an application under section 39 (4). No question of any hereditary trustee or trustees receiving notice of the order could arise when an order is made in purported exercise of the power under section 39 (1) because, in such case, the Committee or the Commissioner does not recognise the existence of the hereditary trustees at all and proceeds to act on the basis that there is no hereditary trustees in office or entitled to hold office.

Even apart from the language in section 39 (4) which shows that section 39 (4) could not apply to a case of the exercise of powers under section 39 (1) it will be inconsistent with the scheme of the Act to hold that the Court could entertain an application under section 39 (4) to set aside an order passed under section 39 (1). Where a person claims that the temple of whose affairs he is in management is a private temple, or that the temple which he admits to be public is in his management as hereditary trustee, and where in such a case the appointment of non-hereditary trustees is made by the Area Committee or by the Commissioner in purported exercise of powers under section 39 (1) such a person would have to seek relief to have the temple declared to be a private temple or to have it declared that he is the hereditary trustee of that temple which he admits to be a religious institution. If it be held that in such case he could file an application under section section 39 (4) to set aside the order appointing non-hereditary trustees, the Court having jurisdiction under section 39 (4) would have to decide the question relating to the character of the institution or the claim of the party to be hereditary trustee. But the scheme of the Act indicates plainly that these questions should be determined by different Tribunals and under a different procedure.

Section 57 enacts that a Deputy Commissioner shall have power to enquire into and decide whether an institution is a religious institution or not and whether a trustee holds or has held office as a hereditary trustee. Therefore, when a person claims (as in this case the petitioners claim) that the temple is a private temple and is therefore not a religious institution as the term is defined in the Act, jurisdiction

to decide that question is vested in the Deputy Commissioner under section 57 (*a*). Similarly, assuming that the temple is a religious institution, the claim of the petitioners that they are hereditary trustees is, again, committed to the jurisdiction of the Deputy Commissioner for decision under section 57 (*b*) of the Act. Against an order passed by the Deputy Commissioner under section 57 (*a*) or section 57 (*b*) an appeal to the Commissioner is provided by section 61 of the Act. If the Commissioner so decides against the claim of the petitioners, they are allowed a right to file a suit under section 62 of the Act. Against an order passed by the Court of the first instance under section 62 of the Act an appeal is provided to the High Court. Surely, it would be unreasonable to hold that questions which the legislature considered of such importance as to be decided after such elaborate enquiry and by such a hierarchy of Tribunals were at the same time committed by the Legislature to a decision in a summary proceedings on an application filed under section 39 (4) of the Act.

Because the legislature considered that the succession of Tribunals provided by sections 57, 61 and 62 of the Act for the determination of these questions was competent and adequate, the legislature expressly barred the jurisdiction of civil Courts to take cognisance of these disputes otherwise than in accordance with those sections. Section 93 of the Act enacts :

"No suit or other legal proceeding in respect of the administration or management of a religious institution or any other matter or dispute for determining or deciding which provision is made in this Act shall be instituted in any Court of law, except, under, and in conformity with, the provision of this Act."

I hold that an application which can be made under section 39 (4) of the Act is only an application in respect of an order made in purported exercise of the Area Committee's and the Commissioner's powers under section 39 (2) of the Act, and that since the order now in question was made in purported exercise of the Area Committee's powers under section 41 read with section 39 (1) of the Act, the application was incompetent. The dismissal of the petition has, therefore, to be sustained not on the ground mentioned by the learned Judge but on a ground more basic to a consideration of the rights of the petitioner and the powers of the Area Committee.

The petitioners felt aggrieved by the order of the Area Committee appointing non-hereditary trustees. The law should undoubtedly give them a right to relief. The learned counsel for the respondent states that the right to relief is provided by section 57 of the Act. The second petitioner had applied in 1954 to the Deputy Commissioner for a declaration that he held office as hereditary trustee. The Deputy Commissioner had said that, on the documents produced by him, his elder brother (the first petitioner), was hereditary trustee and that therefore the second petitioner's claim could not be recognised. That order could not be read as an order declaring the first petitioner to be a hereditary trustee. All that was said was that the case urged by the second petitioner when scrutinised, led to the conclusion that not he but his elder brother was the hereditary trustee. If the elder brother claimed to be hereditary trustee, that claim would have to be heard and decided on its own merits. The first petitioner is free—that is conceded by the respondent's learned counsel—to file an application under section 57 (*a*) and 57 (*b*) to the Deputy Commissioner. The first petitioner may file an application praying for a declaration that the temple is a private temple and that it is not a religious institution as the term is defined in the Act, and, in the alternative if the Deputy Commissioner holds that the temple is religious institution for a declaration that he (the first petitioner) holds office or is entitled to hold office as hereditary trustee. If in such an application the decision is given against him, he may proceed further under sections 61 and 62 of the Act, as has been stated above.

The petitioners' learned counsel says that, if in a case where a hereditary trustee is aggrieved by an order passed in purported exercise of powers under section 39 (1), such person is held not entitled to apply for relief under section 39 (4), such hereditary trustee would have to suffer the hardships consequent on having to hand

over the management of the institution to the non-hereditary trustees appointed in purported exercise of powers under section 39 (1), and to suffer them to continue in management until the hereditary trustee gets his rights established by the machinery provided by sections 57, 61 and 62 of the Act. But, if a person is in management as hereditary trustee, he is bound to have knowledge of the proceedings which are being taken by the Area Committee or by the Commissioner as the proceedings are in progress. Applications would have to be made for appointment as non-hereditary trustee and if the hereditary trustee is in effective management he could not be kept in the dark as to the steps that are being taken to have non-hereditary trustees appointed. He could intervene at that stage by an application to the Deputy Commissioner under section 57 of the Act and, if necessary, move the Commissioner to exercise his powers of general control and superintendence under section 20 of the Act to stay proceedings of the Area Committee until the applicant's application under section 57 is heard and decided. In this particular case, the petitioners say that they were in management. If they were in management and yet did not know that proceedings were being taken to appoint non-hereditary trustees such ignorance should be attributed to their own default. I do not think that the view that section 39 (4) does not apply to an order passed in purported exercise of powers under section 39 (1) can cause any real hardship to a person who is in effective management of the affairs of a religious institution as its hereditary trustee.

The petition is dismissed. No costs.

R.M. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Jugraj Jain .. *Petitioner**

v.

T. R. Ambikapathi Pillai .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), *section* 7 (2) (ii) (*f*)—*Different user—Facts to be considered—Reasonable user for incidental purposes—Scope of—Equitable considerations.*

Where a premises was admittedly used only for residential purposes at the commencement of the tenancy, the natural inference is that it was let for such purpose only. Letting purpose is a question of fact which has to be gathered only from the evidence and circumstances of each case. The mere fact that the landlord accepted an increased rent from the tenant subsequently cannot by itself lead to an inference that the landlord agred to the user of a residential buidling for non-residential purposes.

Even though a house is taken for purely residential purposes, some occupation and profit-making activities by the rvident therein, in a small portion unostentatiously and without running a shop or causing any nuisance, are inevitable and permissible in these days of complex civilization. So too an occupant of a non-residential premises can use a small portion for residence of a watchman or a clerk to safeguard his wares and that man may cook, eat and sleep on the premises provided the nature of the premises is not altered.

Where a premises let for residential purposes is used either inadvertently or out of ignorance by the tenant for business purposes, which transgresses the limits of reasonableness, it will be equitable to give him an opportunity to rectify the error by removing his business to some other place before a stipulated time.

Petition under section 12-B of the House Rent Control Act praying the High Court to revise the Order of the Court of the Small Causes at Madras, dated 19th February, 1957 and made in H.R.A. No. 165 of 1956, preferred against the Order of the Court of the Rent Controller, Madras, in H.R.C. No. 2959 of 1955.

Inamdar Abdus Salam, for Petitioner.

K. Srinivasan and *K. Shanmugham,* for Respondent.

The Court made the following

ORDER.—This is a petition filed by one Jugraj Jain, a tenant, for revising and setting aside the order of the Rent Controller, Madras, dated 3rd April, 1956, in

* C.R.P. No. 663 of 1957. 14th November, 1958. (23rd Kartika, 1880—Saka).

H.R.C. No. 2959 of 1955, directing his eviction and the order of the appellate authority, the Second Judge, the Court of Small Causes, Madras, in H.R.A. No. 165 of 1956, confirming the order of eviction after calling for fresh findings from the Rent Controller on remand.

The facts were briefly these. Jugraj Jain, the petitioner, took premises No. 2-A, Padavatta Amman Koil Street, Kosapet, Perambur Barracks, Madras, on rent from the respondent landlord, Ambikapathi Pillai, for Rs. 70 a month in July, 1951, for his residence. Some four months later he shifted to that house a pawn-broker's business run by him and one Dharmachand Kanyalal Sowcar in partnership. Soon the house was crowded with people seeking to pawn their goods, and, the landlord, who was living upstairs in the same house, felt thoroughly inconvenienced and upset. He protested to the petitioner to stop his pawn-broking business in the premises which was taken only for residential purposes. The petitioner would not desist, but tried to mollify the landlord and prevent an immediate eviction petition by him by increasing the rent at first to Rs. 90 per month and then to Rs. 100 per month. Ultimately, however, he repented for his rash action in increasing the rent like that, on finding that the landlord filed an eviction petition, and filed a petition for fixing the fair rent in 1958, and, the fair rent has now been fixed at Rs. 80 per month. He filed the petition for fixing the fair rent because his attempts at mollifying the landlord by paying increased rent proved infructuous and the landlord filed H.R. C. No. 2959 of 1955 before the Rent Controller and got an order for eviction, and, that order for eviction was confirmed by the appellate authority on 19th February, 1957, and, the petitioner saw no use whatever in continuing to pay an unreasonably high rent when he was to vacate the premises, lock, stock and barrel, residence as well as pawn-broker's business.

Before the Rent Controller, the landlord, Ambikapathi Pillai, had alleged no less than five grounds for eviction, the first being that the premises rented out for residential purposes had been diverted without the permission of the landlord to non-residential purposes. The second was that the tenant had sub-let the premises without the landlord's permission to Dharmachand Kanyalal Sowcar. The third was that the tenant had caused damages to the electric installations by altering its fixtures and tampering with the wires and causing short-circuiting. The fourth was that he had spoiled the flooring by dragging his heavy racks and bureaus recklessly along the floor. The fifth and last was that he had committed acts of waste and nuisance by keeping cattle on the premises, and making the premises highly insanitary.

The tenant had contended that the premises had been let out to him originally both for residential and for non-residential purposes, and that he was, therefore, entitled to run his pawn-broker's business also in the premises, and, that, in any event, under the general law, he could use a small portion of the premises for his occupational and profit-making purposes. He had denied the sub-letting, the wanton damage to electric wires and fittings, the spoiling of the flooring by dragging racks, and the keeping of cattle on the premises and consequential musance and waste. He said that he was keeping only one cow for his own demestic use, and that too with the knowledge and consent of the landlord.

Though the Rent Controller, Mr. Narasimhan, who heard the petition first, held that all the acts alleged by the landlord were proved, and ordered eviction on all those grounds by his order, dated 3rd April, 1956, when the tenant took the matter in appeal, and the appellate authority remanded the petition for fuller hearing and findings, the subsequent Rent Controller, Mr. Swaminathan, gave his findings on 17th January, 1957, to the effect that only the allegation that the residential premises had been in part converted into use for non-residential purposes, *viz.*, the pawnbroker's business was proved and that all the other four allegations of sub-letting, damage to electric wirings, damage to floor, nuisance and waste were unproved and unsustainable. After receiving the findings the appellate authority considered it fully proved that the premises were originally let out only for residential purposes and had been in part converted to non-residential purposes, *viz.*, the

running of the pawnbroker's business, though all the other allegations were not proved. Therefore, he confirmed the Rent Controller's order of eviction and dismissed the appeal with costs.

The petitioner has felt highly aggrieved and has filed this revision petition.

I have perused the records, and heard the learned counsel on both sides. Mr. Inamdar Abdus Salam, the learned counsel for the petitioner, and Messrs. K. Srinivasan and K. Shanmugham, learned counsel for the landlord-respondent, have argued the case fully and fairly.

Mr. Inamdar Abdus Salam raised four main contentions : The first was that both the lower Courts were wrong in holding that the premises were not let both for residential and non-residential purposes. I cannot agree. Both the Courts have found that the premises was rented only for residential purposes, and that is a question of fact which cannot be canvassed again in revision, especially when it is a concurrent finding. But, I am prepared to hold that the finding is correct even on the merits. There was no written lease-deed, and we have only to draw the inference regarding the nature of the letting from the evidence. It is admitted even by the petitioner that he was only living on the suit premises for four months after the letting, and that he brought in the pawnbroker's business only thereafter. This will clearly show that the letting was only for residential purposes and that the petitioner had converted a portion of the premises thereafter for non-residential purposes.

The next contention was that the landlord-respondent had permitted a portion of the premises to be converted into non-residential premises for running the pawnbroker's shop and had for that reason accepted the increased rent of Rs. 90 and Rs. 100 a month, as against the original rent of Rs. 70. I cannot agree with this also. There is nothing in writing to show that the increase of rent was due to the reason alleged by Mr. Inamdar. It may be due to the conscious or unconscious rapacity of the landlord and the desire to get as much as possible from the tenant. It may also be due to the infiltration tactics of the tenant by trying to mollify the landlord and placate him and prevent him from filing an eviction petition by dangling an increased rent as bait before him. Unfortunately, the bait, though taken, did not work. So though this may be taken as an equitable consideration for the order on terms I am going to pass eventually, it will not prove the point taken by Mr. Inamdar.

The third contention of Mr. Inamdar was that even regarding the premises let out for purely residential purposes, a reasonable portion could be used for occupational and profit-making purposes provided there was no conversion of the residential premises to non-residential premises, and no nuisance was caused, and it is unobtrusive and quiet affair not involving the running of a shop or the gathering of crowds as laid down by me in *Krishna Nair* v. *Valliammal*[1], approved by a Full Bench of this Court in *Dakshinamoorthy* v. *Thulla Bai*[2], and once more affirmed and explained by me in *P. Vasudeva Nair* v. *Sri Kalikambal Kannateswarar Devasthanam by its Managing Trustee P. Vedachalam*[3], on 30th October, 1958. The gist of what I have held is that even though a house is taken for purely residential purposes, some occupational and profit-making activities by the residents therein, in a small portion unostentatiously, and without running a shop or causing no nuisance, are inevitable and permissible in these days of complex civilisation. Thus a Judge may keep his case records and dicate his judgments in a portion of his residential house ; a lawyer may advise his clients in a room of his house ; a doctor may give consultation to his clients in a room of his house ; an astrologer may give his predictions to his clients in a room of his house ; a barber may have his select and urgent clients in a room of his house ; a pappadom-maker can make pappadom in a room of his house ; provided the portions so used form only a fraction of the entire premises and does not alter the nature of the premises from

1. (1949) 1 M.L.J. 75. 3. C.R.P. No. 354 of 1958.
2. A.I.R. 1952 Mad. 413.

residential to non-residential, much less effect any structural alternations. So too an occupant of non-residential premises can use a small portion equally unostentatiously and informally for the residence of a watchman or a clerk to safeguard his wares, and that man may cook, eat and sleep in the premises without any permission from the landlord, provided the nature of the premises is not altered, much less structurally. It is impossible to contend in these days that residential premises should only be used for living, eating, sleeping, praying and reading scriptures and other non-money yielding pursuits, or, that non-residential premises should be left without a clerk or servant on the premises with the danger of all the wares being carried away by thieves and burglars.

Mr. Inamdar is rather extravagant when he says that even the entire pawnbroker's shop can be transferred to a portion of the residential premises as the petitioner did four months after he took this premises on rent. That will be making the medicine the daily food, and cannot be tolerated. Nor can I agree with Messrs. Srinivasan and Shanmugham that even keeping valuable pawned articles unostentatiously in a portion of the residential premises will be contrary to law unless the landlord permits it. Surely, we cannot expect a pawnbroker to keep valuable diamonds, gems, jewels, gold, etc., pawned with him in his pawn-shop far away, open to the depredations of thieves, burglars, etc. He could certainly keep them in a safe in his residential premises. But, he cannot convert even a portion of his residential house into a shop, or allow a whole army of people who want to pawn their articles, costly and cheap, small and big in his residential premises, converting the residential premises practically into a pawnbroker's shop.

Mr. Inamdar asked why honest pawnbrokers cannot operate in those premises in this Republic of India aiming at a classless society. There is nothing wrong in pawnbrokers and pawnees operating with each other. But they should not operate in residential premises, causing nuisance to the landlord occupying a portion of the house. These operations must be carried on only in separate non-residential premises, as the petitioner was doing for four months after he took this premises for his residential purpose. There is no use stretching the rules beyond their legitimate scope.

The fourth contention of Mr. Inamdar was that the petitioner was not quite aware of the scope and limit of the rulings mentioned above and had, therefore, trespassed those limits; and that he was prepared to remove the pawnbroker's business to outside non-residential premises within a reasonable time, and might be given an order setting aside the eviction on terms, especially as the pawnbroker's business had been going on in the premises for the last seven years without the heavens falling, or the landlord suffering.

Messrs. Srinivasan and Shanmugham could not urge any strong arguments against this request for an order on terms, but urged that in that case the rent of Rs. 100 a month may be kept on till the date of the re-shifting of the pawnbroker's business to outside non-residential premises to be fixed up by him, so that the landlord may get some compensation for this indulgence. I cannot agree that the fair rent fixed should be unfixed and replaced by an unfair rent. If the fair rent fixed was not the correct one the remedy is by way of appeal, revision, etc. An appeal has been filed, and the fair rent has been finally fixed at Rs. 80 per month. I see no reason to increase that fair rent. The legal way to punish the petitioner for transgressing the limits of residential uses is not by imposing as unfair rent on him, but by saddling him with costs when granting him the indulgence of an order setting aside the eviction on terms. Costs are the supreme panacea for all procedural ills.

In the end, therefore, I direct that if the petitioner pays Messrs. K. Srinivasan and Shanmugham, learned counsel for the respondent, Rs. 100 as consolidated costs for the two hearings before the Rent Controller, two hearings before the appellate authority and the hearing in this Court, to compensate the landlord for his laches, and also shifts the pawnbroker's business from this house on or before 16th January, 1959, and removes the board of pawnbroker from the house, and does not enter-

tain people with their goods for pawning in those premises, but confines himself to the limits prescribed above, *viz.*, simply storing the valuable pawned articles and documents in a room in those premises, then the orders of eviction passed by the Rent Controller and the appellate authority will be set aside and this revision petition allowed without costs. But, if the above conditions are not complied with them the orders of the Rent Controller and the appellate authority will stand confirmed, and this civil revision petition will stand dismissed with costs, including an advocate's fee of Rs. 35.

R.M. ——— *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE GANAPATIA PILLAI.

Wazir Sultan & Sons .. *Appellant**

v.

P. Satchithananda Rao and another .. *Respondents.*

Limitation Act (IX of 1908), *section* 20 (1)—*Construction and scope—Acknowledgment of payment in writing—Payment on account of debt—Whether the acknowledgment should show on the face of it—Evidence.*

The creditor to get the benefit of an extension of limitation has to prove two facts (1) that there has been a payment on account of the debt before the expiration of the prescribed period by the person liable to pay the debt or by his duly authorised agent and (2) that there is an acknowledgment of the payment in the handwriting of or in writing signed by the person making the payment.

The fact that the payment of money was on account of a debt can be proved by evidence and it need not appear on the face of the acknowledgment of payment in writing. It can always be proved that a payment was towards a particular debt. The Court may infer from circumstances and probabilities that a payment was towards a particular debt.

It is the payment that starts the fresh period of limitation and not the acknowledgment of the payment.

Case-law discussed.

Appeal against the decree of the City Civil Court, Madras, dated 9th January, 1957 and made in Original Suit No. 1456 of 1955.

K. Rajah Ayyar and *R. Rangachari*, for Appellant in both appeals.

T. M. Krishnaswami Ayyar and *T. R. Srinivasan Ayyangar*, for 1st Respondent in C.C.C.A. No. 15 of 1957.

A. Seshachari and *A. Srivisan*, for 2nd Respondent in both appeals.

V. N. Srinivasa Rao, for 1st Respondent in C.C.C.A. No. 16 of 1957.

The Judgment of the Court was delivered by

Rajamannar, C.J.—These two appeals arise out of two suits filed originally in this Court on its Original Side (C.S. Nos. 103 and 183 of 1954) and subsequently transferred to the City Civil Court at Madras where they were numbered as O.S. Nos. 1456 and 1463 of 1955 respectively. Both the suits were tried together by the learned Additional Judge of the City Civil Court and decreed as prayed for. The first defendant in the two suits is the appellant in the two appeals before us. O.S. No. 1456 of 1955 is a suit to recover a sum of Rs. 26,798-4-7 alleged to be due for balance of principal and interest in respect of a promissory note executed on 1st March, 1951, by the first defendant, Ms. Wazir Sultan & Sons, a firm of merchants carrying on business at Hyderabad, in favour of the second defendant, Shyamala Industrial Corporation, Ltd., a private limited company, for Rs. 32,691-5-2 O.S. (that is, Hyderabad currency) and assigned by the second defendant to the plaintiff, Karlapaty Syamlamba, on 15th January, 1954. The following are the material allegations in the plaint. On 1st March, 1951, the defendants settled their accounts in respect of a partnership business carried

* C.C.C.A. Nos. 15 and 16 of 1957. 20th November, 1958. (29th Karthika 1880—Saka).

on by them at Secunderabad and the second defendant retired from the partnership and released its rights therein in consideration of a sum of Rs. 32,691-5-2 agreed to be paid by the first defendant to the second defendant. For this sum the first defendant executed a promissory note agreeing to pay the sum with interest at 4 per cent. per annum. Towards the promissory note a sum of Rs. 2,691-5-2 (O.S.) was paid and there is a sum of Rs. 30,000 (O.S.) now due for principal, equivalent to Rs. 25,714-4-7 in Indian Currency and interest from 1st March, 1951, which comes to Rs. 1,084. On 19th February, 1954, the first defendant paid a sum of Rs. 2,000 by a cheque towards the promissory note. After giving credit for the said sum, an amount of Rs. 26,798-4-7 is due for principal and interest. The first defendant by partner Abdul Hameed Sultan filed a written statement in which the execution of the promissory note was admitted. The only plea was that in addition to the payments admitted by the plaintiff to have been received, the defendant made further payments of Rs. 5,000 (O.S.), Rs. 5,000 (O.S.) and Rs. 2,000 (Indian Currency) on 12th June, 1951, 21st July, 1951 and 17th, October, 1951, respectively and therefore the first defendant is liable to pay only the amount that may be found due after giving credit to these payments. These payments were alleged to have been made to Mr. K. Appa Rao, Managing Director of the second defendant company. The first defendant complained that the said Appa Rao had for his own reasons unlawfully treated the said payments to other accounts on which no amount was due to him and had also filed another suit. The plaintiff was no other than the mother of the said Appa Rao and the plaintiff in the other suit is no other than his nephew. An error in the calculation of the amount due in the plaint was also pointed out.

The other suit, O.S. 1463 of 1955, is a suit on another promissory note executed on 2nd January, 1950, by the first defendant, M/s. Wazir Sultan & Sons, represented by its managing partner Hameed Sultan, in favour of the second defendant, K. Appa Rao, for a sum of Rs. 45,000 and transferred by him to the plaintiff on 25th August, 1951. The following are the material allegations in this plaint. On 2nd January, 1950 the first defendant by its managing partner Hameed Sultan executed a promissory note in favour of the second defendant for a sum of Rs. 45,000 (O.S.) repayable with interest at 12 per cent per annum. In respect of the said promissory note the first defendant paid to the second defendant two sums of Rs. 5,000 each on 12th June 1951 and 21st July, 1951, respectively. The balance due in respect of the principal and interest is Rs. 52,985 (O.S.) equivalent to Rs. 45,414 in Indian Currency. The first defendant practically admitted the execution of the promissory note but denied all liability under it. His case was as follows; By deed of partnership dated 12th June, 1949, the first defendant and Shymala Industries Corporation, Ltd., a private limited company of which K. Appa Rao was the Managing Director, became partners and conducted business at Hyderabad. Under the said deed of partnership the Shyamala Industries Corporation, Ltd., was to invest in the partnership firm capital to the extent of Rs. 70,000 and the second defendant, its Managing Director, was to be in sole charge of the business. The partnership commenced its business, on 12th June, 1949 and was dissolved by mutual consent on 28th February, 1951. Advances were made by the Shyamala Industries from time to time and as per the balance sheet of the partnership as on 31st December, 1949, the total sum thus advanced was Rs. 42,959-14-0. In respect of this amount the second defendant K. Appa Rao, Managing Director of the Shyamala Industries Corporation, Ltd., desired that the first defendant should execute a promissory note for a sum of Rs. 45,000 in his favour, and in pursuance of such a request he executed the promissory note. It was specifically agreed at the time that the suit promissory note was enforceable only to the extent of the amount that might be ultimately due by the partnership. The promissory note was an Additional security for the sums advanced As per the balance sheet of the partnership firm drawn on 28th February, 1951, the date of its dissolution, the first defendant had to pay to the other partner a sum of Rs. 16,490-8-10 towards the balance due on the loan account and half the losses of the partnership which amounted to Rs. 34,741-0-8. After certain adjustments it was settled that the first defendant was liable to pay the sum of Rs. 32,691-5-2 and for this sum a promissory note was executed by the first defendant in favour of the Shyamala

Industries Corporation, Ltd., (the promissory note which is the subject-matter of O.S. No. 1456 of 1955). This sum included the balance due in respect of the advances made by second defendant to the firm. Hence the suit promissory note for Rs. 45,000 automatically got extinguished and is therefore not enforceable. The assignment in favour of the plaintiff who is a near relation of the second defendant is fraudulent and intended to make the first defendant liable twice over for the same debt. Though the first defendant demanded a return of the promissory note the second defendant promised to do so but did not. The first defendant also raised a plea of limitation as the suit had been filed more than three years after the execution of the promissory note.

Both the suits were tried together and the evidence adduced by the parties was treated as evidence in the two suits. The learned trial Judge held that the promissory note for Rs. 45,000 was not executed for the purpose and in the circumstances set out by the first defendant, that the said promissory note was not extinguished by the execution of the other promissory note for Rs. 32,691-5-2 as alleged by the first defendant, that the two sums of Rs. 5,000 each were sent by the first defendant in part payment of the promissory note for Rs. 45,000 and not for the other promissory note and that the suit was not barred by limitation. Following the result of these findings, the learned Judge also held that the first defendant should not be given credit to the said two sums as payments towards the promissory note of Rs. 32,691-5-2. There was one other payment of Rs. 2,000 made by the first defendant on 17th October, 1951, which K. Appa Rao credited towards his alleged dues in respect of a mica transaction. The learned Judge expressed a doubt whether Appa Rao could lawfully appropriate this sum towards the mica account when such appropriation was disputed by the first defendant. But he held that the said sum could not be taken as paid towards the promissory note for Rs. 32,691-5-2 and refrained from recording a definite finding as to what relief the first defendant should get for this admitted payment. In the result both the suits were decreed as prayed for.

The main contest in these two appeals has centred round the promissory note for Rs. 45,000 executed by the first defendant in favour of the second defendant Appa Rao on 2nd January, 1950 (Exhibit B-4). It runs thus :

"On demand we promise to pay Mr. K. Appa Rao or his order a sum of Rs. O.S. Rs. 45,000 (Rupees Forty-five thousand only) with interest at 12 per cent. per annum for value received in cash:

The first defendant's case in short is that there was no payment in cash of any sum and that the promissory note was executed as an additional security for the sums advanced by K. Appa Rao as the Managing Director of the Shyamala Industries Corporation, Ltd., as per the terms of the partnership agreement. The partnership deed executed on 12th June, 1949 by and between the first defendant firm and the Shyamala Industries Corporation, Ltd., (Exhibit B-1) provided *inter alia* that the Shyamala Industries Corporation, Ltd., should invest in the business an amount to the extent of Rs. 70,000 only free of interest and that any amount advanced over and above this sum shall carry interest at a rate not exceeding 4½ per cent. per annum. The Shyamala Industries Corporation, Ltd., shall be in sole charge of the staff and establishment of the business, and have the power to lend moneys and to operate upon the funds and bank accounts of the company and shall also be in sole charge and control of the running of the business. The balance sheet as on 31st December, 1949, diclosed that the Shyamala Industries Corporation, Ltd., had invested a sum of Rs. 42,959-14-0 as on that date. According to the first defendant, the promissory note was executed as a security for this sum rounded off to Rs. 45,000. Abdul Hameed Sultan, the managing partner of the first defendant firm, in his evidence deposed as follows :

"Appa Rao did not pay me cash Rs. 45,000 either on that day or any day before or afterwards. I executed the pronote because K. Appa Rao said that he has advancced to the partnership business and there is no security and he asked me to give the pronote as security for the amounts advanced"

He asked Appa Rao why a promissory note was necessary and Appa Rao gave as a reason that his partners were compelling him to obtain a promissory note. There are several circumstances which, in our opinion, lead us to the conclusion that this cas

cannot be true. In the affidavit filed by one Ramamoorthy, the Head Clerk of the first defendant's firm, in support of the application filed by the first defendant in this Court for leave to appear and defend the suit, it was stated that this promissory note for Rs. 45,000 was security for any possible losses which the first defendant would have to bear ultimately. This case is quite inconsistent with the case subsequently developed by the first defendant that the promissory note was intended to serve as an additional security for the sums advanced by the Shyamala Industries Corporation, Ltd. We are unable to comprehend how the promissory note would be an additional security. Under the terms of the partnership deed the advance up to Rs. 70,000 bore no interest; but the promissory note provided for interest at 12 per cent per annum. It is most unlikely that the first defendant would promise to pay interest, and at that high rate, for amounts advanced by the Shyamala Industries Corporation, Ltd., which they were bound to advance. In our opinion, the conduct of the first defendant subsequently, at the time of the execution of the second promissory note, is conclusive on the point and demonstrates the falsity of the plea. It is common ground that the later promissory note for Rs. 32,691-5-2 comprised the amount due in respect of the advance made by Shyamala Industries Corporation, Ltd., as per the terms of the agreement. If the version of the first defendant is true, one would have ordinarily expected a cancellation of the promissory note for Rs. 45,000 on the execution of the other promissory note. Indeed that it must be deemed to have been cancelled is the case of the first defendant. But admittedly no such thing was done and the promissory note was allowed to continue with Appa Rao. The first defendant says that he asked Appa Rao for the return of the promissory note but Appa Rao said that it was in Madras and that it would be returned as soon as he goes there. He again asked Appa Rao when he came to Hyderabad and he was told that he, Appa Rao, had forgotten to bring the promissory note. In spite of this no written demand was ever made by the first defendant for the return of the promissory note.

Admittedly two drafts drawn on the Central Bank of India for Rs. 5,000 (O.S.) each were sent by Hameed Sultan the managing partner of the first defendant firm, to K. Appa Rao. In the accompanying letter there is no mention regarding the purpose for which these two amounts wre sent, whether they were towards either of the promissory notes or on any other account. But it is not without significance that the two amounts are sent to K. Appa Rao by name and not to the Shyamala Industries Corporation. The first defendant does not say that there was any liability to pay any amounts to K. Appa Rao individually. Hameed Sultan in his evidence no doubt would say that though in law Appa Rao may be distinct from Shyamala Industries Corporation, in substance they were the same and he was dealing only with Appa Rao in all his transactions. It is idle to expect any Court to accept this explanation when to his knowledge there were two promissory notes executed, one in favour of K. Appa Rao and the other in favour of the Shyamala Industries Corporation. The cheque for Rs. 2,000 sent on 20th February, 1954, was drawn in favour of the Shyamala Industries Corporation. The assignee of the promissory note for Rs. 45,000 who is the plaintiff in O.S. No. 1463 of 1955, issued a notice through his advocate calling upon the first defendant to pay the balance of principal and interest due in respect of the said promissory note after giving credit to the two sums of Rs. 5,000 (O.S.) each sent by means of two drafts. The reply to this demand is curious. It (Exhibit B-15) runs thus:

> "Reference to your notice on behalf of your client Mr. P. Satchithananda Rao of Audiappa Naick Street, Madras, I have to inform you that as already informed Mr. K. Appa Rao the supposed transferor of the alleged promissory note that it is not at all valid and it has been considered invalid. Also that the transferor or any action taken thereon does not bind me or my firm.
>
> Further I deny that payments were made in respect of the said promissory note. Any action that may be taken by your client on such wrong promissory note shall be at his own risk."

There is not a whisper in this important letter of the defence eventually set up at the trial, namely, that the promissory note had been executed only as additional security for the advances made to the partnership by the Shyamala Industries Corporation, and that it became unenforceable on the execution of the promissory note for Rs. 32,691-5-2 (O.S.) by the first defendant in favour of Shyamala Industries Corpora-

tion. There was a similar notice of demand from the assignee of this later promissory note through his advocate on 3rd February, 1954 (Exhibit B-17). In this notice credit was not given to the two sums of Rs. 5,000 (O.S.) each which had been sent by the first defendant to Appa Rao. The reply to this notice is as follows (Exhibit B-18):

"As per our conversation, we are herewith sending you a cheque No. H. A. 23497, dated 10th February 1954 for Rs. 2,000 and the balance will be paid to you in due course. Mr. T. R. S. Iyengar had sent a notice on 3rd instant and we find that the balance shown in it does not tally with our books. Please verify the same and send us the amended accounts."

It is not a little surprising that there is no mention of the plea now raised that the aforesaid two sums had been paid towards this promissory note.

It is most extraordinary that the first defendant did not produce any books of account. The curious reason given for this conduct is that they were not bound to produce them unless they were called upon to do so by the plaintiff. The explanation has only to be stated to be rejected. It cannot be expected of the plaintiff to summon for the production of the defendant's account books. If the first defendant wanted to establish their case that there was no consideration for the promissory note for Rs. 45,000, and that amount was not paid in cash to them, it was their duty to produce the books for the relevant period to show that no such amount was received by them. During the hearing of the appeal an application was made on behalf of the first defendant, C.M.P. No. 5927 of 1958, to admit the day book and ledger purported to have been maintained by their firm during the relevant period. In the affidavit filed by a partner of the firm, not Hameed Sultan, the managing partner, the reason given for not producing the account books earlier is that their advocate did not advise them to produce them as there was no notice served on them by the other side to produce them. The application was opposed and we have no hesitation in dismissing it. The application is very belated and, if granted, there will have to be a remand and practically a retrial of the case.

As the execution of the promissory note in question (Exhibit B-4) was admitted, the onus lay on the first defendant as the executant to prove that there was no consideration for it and that it was executed in the circumstances and for the purpose mentioned in its written statement. We are of opinion that the first defendant has not discharged that onus. It was not even suggested that Appa Rao was not financially in a position to advance the sum of Rs. 45,000. There is also evidence that the first defendant firm was in need of finance. Hameed Sultan the managing partner admitted that at or about the material time he floated three companies, the authorised capital of which was respectively Rs. 6,25,000, Rs. 5,00,000 and 10,00,000. By the end 1949 all these companies had gone into liquidation. About Rs. 90,000 (O.S.) was due to the Industrial Trust Funds, Ltd., and they were discharging the debt in instalments. As we have said before, the first defendant has not produced the account books of the firm to show that the amount was not received in cash. No adequate explanation has been forthcoming as to why the promissory note was executed if no money had been paid. We are not in the least impressed with the explanation attempted by the first defendant that it was as security for the sums advanced to the partnership by Appa Rao or Shyamala Industries Corporation. We have mentioned the circumstances which conclusively prove that the first defendant's explanation cannot be true. We hold, agreeing with the learned trial Judge, that the promissory note in question has not been shown to be devoid of consideration.

We have deliberately refrained from referring so far to certain copies of letters and credit slips, the originals of which are alleged to have been posted by Appa Rao to the first defendant. These are Exhibits A-1 and A-2 which relate to the first demand draft for Rs. 5,000 sent on 12th June, 1951 and Exhibits A-3 and A-4 which relate to the second sum of Rs. 5,000 sent on 21st July, 1951. In the letter dated 19th June, 1951 (Exhibit A-1), we find it stated that the amount sent had been credited towards the promissory note account of the first defendant. The enclosed credit slip is in the following terms :

"Received from Hyderabad Vazir Sultan Garu, Credit towards pronote for Rs. 45,000, dated 2nd January, 1950, executed in favour of K. Appa Rao by cheque sent on Hyderabad Central Bank bearing No. B. 404831 for rupees four thousand two hundred and eighty five and annas eleven only."

Exhibits A-3 and A-4 are the corresponding letter and credit slip for the second sum of Rs. 5,000. We must say that we are not completely satisfied with the genuineness of these copies. It is not clear if they were sent by registered post. If they were, the acknowledgment should have been filed but they are not. The copies which are now produced can be brought into existence at any time. Exhibit A-7 was put forward by the plaintiff as the receipt given by the post office for the envelope containing Exhibits A-3 and A-4 sent by Appa Rao to Abdul Hameed Sultan. We are not convinced that this is so. In Exhibit A-3 the addressee's name is given as Mr. Hameed Sultan whereas the receipt contains the name Abdul Hameed Sultan. One cannot help remarking that if this postal receipt was so well preserved, why was not the acknowledgment which would contain the signature of some one on behalf of the first defendant preserved and produced. We do not therefore wish to rest our decision on these documents. A copy of a notice alleged to have been issued to the first defendant by the advocate for Appa Rao calling upon the first defendant to pay the principal and interest due upon the promissory note, dated 2nd January, 1950, was relied on (Exhibit A-6, dated 1st June, 1951). Appa Rao admitted in evidence that this was a copy of a copy of the notice prepared a few days before it was filed into Court. This document was rightly rejected by the learned Trial Judge.

The promissory note (Exhibit B-4) recites receipt of Rs. 45,000 in cash while the case of the first defendant was that no cash was paid. The case of Appa Rao was that he did pay cash. To probabilise his version, Appa Rao put forward the case that he collected about Rs. 39,000 by sale of lands belonging to his mother at Jaggayyapet through his manager, one Narasimha Ayyar (P.W. 2) and that it was this money that was paid to the first defendant as consideration for the promissory note In support of his case he relied upon the day book and ledger of the United Commercial Syndicate which stands for all practical purposes for its proprietor Appa Rao. Registration copies of sale deeds executed to several persons were filed in further support of this case. These sale deeds however bear dates subsequent to the date of the promissory note in question, ranging as they do from February, 1950. Mr. Rajah Ayyar commented on many infirmities in the case sought to be built up on the entries in the account books. There is some force in at least some of the comments, but we do not think it necessary for the disposal of this appeal to discuss in detail the several entries and the oral evidence relating to them and to give a finding on the question whether Appa Rao advanced the amount of Rs. 45,000 (O.S.) from and out of moneys obtained by him by sale of lands belonging to his mother. As the learned Judge has said, there was no necessity to plead that Appa Rao got the money advanced for the promissory note Exhibit B-4 from any particular source. It is sufficient to state that it was for the first defendant to prove by satisfactory evidence that no consideration passed for the promissory note and that it was executed in the circumstances alleged by him and that it was not enforceable as such.

On 17th October, 1951, the first defendant sent another draft on the Central Bank of India, Ltd., for Rs. 2,000 (I.C.) to Appa Rao. Appa Rao acknowledged this by his letter, dated 22nd October, 1951, (Exhibit B-11) but added that his advocate has already notified to the first defendant that he had assigned the promissory note in favour of Sri P. Satchithananda Rao and he was therefore crediting the amount to the mica account. He called upon the first defendant to remit the balance of Rs. 12,000 due on that account and take possession of the mine. On 1st November, 1951, the first defendant in reply to this definitely informed Appa Rao that they did not agree to or accept his mica accounts and therefore to his crediting the said Rs. 2,000 to the mica account and that the sum should be "credited to the amount due on Auction Account only". The learned Judge has in more than one place expressed a doubt as to whether Appa Rao was entitled to credit this amount of Rs. 2,000 to the mica account about which there was

dispute between the parties. Mr. T. M. Krishnaswami Ayyar appearing for the plaintiff in O.S. No. 1456 of 1955 did not contend that the amount should be credited to the mica account. He agreed that it may be credited to the promissory note of Rs. 45,000 (Exhibit B-4).

There remains only the question of limitation. The promissory note for Rs. 45,000 (Exhibit B-4) was executed on 2nd January, 1950. The suit was brought on 3rd February, 1954, that is, beyond three years. To save the suit from the bar of limitation the plaintiff relies on two payments by drafts drawn on the Central Bank of India and sent along with the covering letters, Exhibits B-8 and B-9 on 12th June, 1951 and 21st July, 1951, respectively, and the provisions of section 20 of the Indian Limitation Act. The material provisions of that section as it stands now, and as it stood on the date of the suit are as follows :—

"*Section* 20 (1).—Where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period, by the persons liable to pay the debt or legacy, or by his duly authorised agent, a fresh period of limitation shall be computed from the time when the payment was made :

Originally the sub-section ran as follows :

Where interest on a debt or legacy is, before the expiration of t he prescribed priod, paid as such by the person liable to pay the debt or legacy, or his agent duly authorised in this behalf,

or where part of the principal of a debt is, before the expiration of the prescribed period paid by the debtor or by his agent authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made."

By the Indian Limitation (Amendment) Act, 1927, in place of the old proviso the following proviso was substituted :

"Provided that, save in the case of a payment of interest made before the 1st day of January, 1928, an acknowledgment of the payment appear in the hand-writing of, or in a writing signed by the person making the payment."

As the sub-section now stands, the distinction between the payment of interest as such and the payment of part of the principal of a debt no longer exist. The words are general so far as a debt is concerned. The payment must be "on account of a debt". According to the sub-section as it now stands, the creditor to get the benefit of an extension of limitation, has to prove two facts : (1) that there has been a payment on account of a debt before the expiration of the prescribed period by the person liable to pay the debt or by his duly authorised agent and (2), that there is an acknowledgment of the payment in the handwriting of, or in a writing signed by, the person making the payment. It is important to keep these two requirements separate. Payment is an act. It consists in the passing of money or the equivalent of money from one person to another. The acknowledgment is a record in writing. Section 20 (1) does not admit of an oral acknowledgment.

When a payment, say of money, is made by one person to another, it may be made for different reasons. The payment may be in person, in which case the person paying may mention to the person receiving the money the purpose for which the payment is made. Apart from any authority, it appears to us to be common sense to hold in such a case evidence can be given as regards the purpose for which the payment was made. Now obviously a payment alone, even if it is established that it was on account of a debt, would not be sufficient to start a fresh period of limitation. There should be an acknowledgment of the payment in a document either in the handwriting of, or in writing a signed by the person making the payment. This acknowledgment is only evidentiary in character. It is the payment that starts the fresh period of limitation and not the acknowledgment of the payment. Vide *Visvanath Raghunath* v. *Mahadeo Rajaram*[1], per Beaumont, C.J. Hence it has been held that the fresh period of limitation would start from the date of the payment and not from the date of the acknowledgment, *Ram Prasad Mohan Lal, In re*[2]. In *Visvanath Raghunath* v. *Mahadeo Rajaram*[1], cited above, Beaumount, C.J., observes thus:

"It is true that the payment has to be made within the prescribed period; but the Act does not provide that the acknowledgment is to be made within that period. It is the payment and not the acknowledgment which extends the period of limitation. The acknowledgment is merely a matter of evidence and provided it is signed before the suit is commenced that appears to me to be sufficient."

1. (1933) I.L.R. 57 Bom. 543. 2. A.I.R. 1923 Nag. 117.

While the words "on account of a debt" occur in the main sub-section they do not occur in the proviso. Under the proviso, all that is required is an acknowledgment of the payment in the handwriting of, or in a writing signed by, the person making the payment.

Mr. Rajah Ayyar, learned counsel for the first defendant-appellant contended that the acknowledgment of the payment should on the face of it show that it is a payment on account of a debt. But the language of the proviso does not compel us to agree with this contention. In support of his argument he relied on an early ruling of this Court in *Mackenzie* v. *Tiruvengadathan*[1], which was followed without discussion in *Ram Chander* v. *Chandi Prasad and others*[2], and the decision of a single learned Judge of the Patna High Court in *Gobind Ram* v. *Firm Chuni Ram*[3]. In *Mackenzie* v. *Tiruvengadthan*[1], to compute a fresh period of limitation, a cheque drawn in favour of the debtor and endorsed by him to the creditor was relied on. That was the only writing which they produced in evidence of a part payment made on account of the principal. No evidence was produced to show that the endorsement had been made and signed by the debtor. It was held by Parker, J., who first tried the suit that this would not avail the plaintiff as there was no evidence even as to who made the endorsement. On appeal, the learned Judges confirmed this decision but made the following observations obiter :

"Assuming that respondent No. 2 (the debtor) endorsed the cheque B, it does not satisfy the requirements of section 20 of the Act of Limitation. The proviso to that section requires that the fact of the part-payment should appear in the handwriting of the debtor or his agent. The cheque is only an order for payment, and it does not evidence any payment at all. Nor does it show for what purpose the payment was made. There is no doubt, some parole evidence as to the payment, but the Act requires that the fact of the payment, and that such payment was a part-payment, should appear in writing signed by the debtor or his agent authorized to make the payment".

It is necessary to remember that the proviso under the Limitation Act of 1877, which was the Act applicable, ran thus :

"Provided that in the case of part-payment of the principal of a debt, the fact of the payment appears in the handwriting of the person making the same."

The observations must be understood in the context that what was relied on was a cheque. There has been considerable change of opinion as regards the conception of payment by cheque and it is now well established that a cheque may be treated as payment. A full discussion of the topic is to be found in *Subramanyam* v. *Venkatarathnam*[4], and *Prafulla Chandra Nag* v. *Jatindra Nath Kar*[5]. There is also the difference in language between the section as it stood then and as it now stands. We cannot treat the decision in *Mackenzie* v. *Tiruvengadathan*[1], as an authority on section 20, sub-section (1) as it now stands. In *Gobind Ram* v. *Firm Chuni Ram*[3] a certain amount was sent by the debtor by money order; but there was nothing in the money order coupon to show on what account the remittance was made. Rowland, J., held that the requirement of section 20 was not satisfied. The reasoning of the learned Judge can be stated in his own words :

"I think the acknowledgment must appear on its face to be on account of the debtor, at least on account of a debt whereas in the money order coupon there is nothing at all to show on what account the remittance was made."

The learned Judge was apparently of the view that it is necessary that the connection between the payment and the debt should appear on the face of the writing required by the proviso to section 20 (1) of the Limitation Act. With respect to the learned Judge we do not agree with him as his view is not supported either by the language of section 20 or by the decisions of Courts. An early decision of the English Courts in *Tippets* v. *Heine*[6], was relied on but it does not directly bear on a construction of the present sub-section (1) of section 20 of the Indian Limitation Act.

Mr. T. M. Krishnaswami Ayyar for the plaintiff-respondent relied on certain observations and decisions as supporting his contention that the conditions required

1. (1886) I.L.R. 9 Mad. 271.
2. (1897) I.L.R. 19 All. 307.
3. A.I.R. 1942 Pat. 47.
4. (1956) 2 An. W.R. 33.
5. I.L.R. (1938) 2 Cal. 320.
6. (1834) 149 E.R. 1074.

by section 20 must be deemed to have been complied with in this case. His argument was that it can be proved by evidence that a payment was on account of a debt and that it is not necessary that the acknowledgment of the payment should specify expressly the debt towards which the payment had been made. It may be by evidence of surrounding circumstances or of direct parole evidence of what happened at the time of payment. It may consist in an appropriation by the creditor of an open payment. All that section 20 (1) requires is proof of payment on account of a debt and an acknowledgment of payment in the handwriting of, or in a writing signed by, the person making the payment and proof of the payment can be in any manner recognised in law. So the argument ran. Great reliance was placed on the observations made by the Judicial Committee in *Rama Shah* v. *Lal Chand*[1]. No doubt that was a case decided before the amendment of 1942 and related to the true construction and effect of section 20 of the Limitation Act as amended by the Amending Act of 1927. The decision on the facts in that case has no direct application to the present case. There the suit was brought on a promissory note, dated 4th February, 1930. The suit was instituted on 24th January, 1936. To save the suit from the bar of limitation, an endorsement on the promissory note in the writing of the defendant, dated 24th January, 1933, was relied on. The endorsement ran thus :

"Paid Rs. 100 to-day in this pronote".

The High Court of Lahore held in appeal from the decree of the Subordinate Judge who gave a decree to the plaintiff that the sum of Rs. 100 was never appropriated by the debtor or by the creditor either to interest or part-payment of principal until the date of suit, that is, until long after three years had elapsed from the date of the promissory note and, therefore, the suit was time-barred. The reasoning of the High Court was that a payment made generally on account of an interest bearing debt becomes a payment towards the principal only by appropriation thereto and must, in order to have the effect of preventing limitation, be appropriated before the period of limitation had expired. The Judicial Committee held, reversing the decision of the High Court, that as there was evidence that the payment had been appropriated to principal by the defendant within the prescribed period, the suit was not barred. There is considerable discussion on the import of the words " as such " in relation to the payment of interest but that discussion is now academic having regard to the amendment in 1942. Dealing with the right of appropriation by a creditor, their Lordships said :

" The subject of ' appropriation of payments ' is dealt with in the Indian Contract Act by sections 59 to 61, inclusive. Section 60 provides that, when the debtor has omitted to intimate, and there are no other circumstances indicating to which debt the payment is to be applied the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor".

Their Lordships laid down that the creditor's act of appropriation of payment to the principal debt should be before the lapse of the prescribed time. On the facts they held that there had been such an appropriation within the prescribed time. There is one passage in the opinion of their Lordships which does help the plaintiff-respondent and that is this :

" stress was laid on the change in the proviso from ' the fact of the payment appears' to ' an acknowledgment of the payment appears ', but neither expression affords in their Lordships' opinion any ground for holding that the character of the payment, as intended to go towards interst or towards principal, must appear by the writing, still less that it must be ascertainable or ascertained at the date of the payment".

The ruling in *Kandaswami Mudaliar* v. *Thevammal*[2], though given long before the above Privy Council decision, proceeds on the same assumption. It was held that according to the plain language of the proviso to section 20 of the Limitation Act, what is required is acknowledgment of payment. Whether the said payment is payment towards interest as such or principal can be proved by other evidence. Though this decision was also before the amendment of 1942, it is valuable because

1. (1940) 1 M.L.J. 895 : L.R. 67 I.A. 160 : I.L.R. (1940) Lah. 470 (P.C.).
2. (1937) 2 M.L.J. 54.

of its construction of the proviso which remained unaltered by the amendment in 1942. In that case a promissory note was executed by the debtor in favour of his creditor and it was alleged by the creditor that it was towards a portion of the interest on the debt due under the previous note in his favour. The lower Courts accepted this case of the creditor. It was held that the promissory note saved the suit brought on the original debt from the bar of limitation. The learned Judge, Venkataramana Rao, J., held that evidence could always be given that the payment was made towards a particular debt. After a discussion of several decisions of this Court and other Courts, the learned Judge held that so far as part of principal was concerned, a writing need not show that payment was towards principal. He pointed out :

"If the scheme of the Act is taken into consideration, it does not appear to be the intention of the Legislature that the writing evidencing the payment should also indicate that the payment is towards interest or principal. Section 19 deals with an acknowledgment of liability as such in respect of any property or right or debt. Section 20 is intended to provide by way of statutory declaration that from the fact of payment of interest or part-payment of principal of a debt you can imply acknowledgment of liability in respect of the debt. If it was intended that the writing also should specify that the payment was towards interest or principal of a debt, section 20 is superfluous as the writing will operate as an acknowledgment under section 19 of the Limitation Act. I am therefore of opinion that the writing need not specify that the payment was made towards interest or principal. That any payment was made towards a particular debt evidence can always be given ".

It may be mentioned in passing that the decision in *Mackenzie* v. *Thiruvengadathan*[1], was referred to by the learned Judge and its scope limited. In *Prafulla Chandra Nag* v. *Jatindra Nath Kar*[2], it was held that when part-payment of a debt is made and accepted by cheque written in the handwriting of the person liable to pay the debt, it was evidence both of the fact of payment and of acknowledgment within the meaning of section 20 of the Indian Limitation Act. At page 325, S.K. Ghose, J., said :

"The Indian statute only requires that the acknowledgment must be of the payment. It is not necessary that it must also be stated that the payment is towards a particular debt."

There is no direct authority of this Court or of any other Court on the construction of sub-section (1) of section 20 of the Limitation Act as amended in 1942. But the principles which have been, in our opinion, clearly laid down in dealing with section 20 (1) before 1942 will apply to cases arising after the amendment of 1942. We hold that the fact that the payment of money was on account of a debt can be proved by evidence and it need not appear on the face of the acknowledgment of payment in writing. It can always be proved that a payment was towards a particular debt. The Court may be called upon to infer from circumstances and probabilities that a payment was towards a particular debt. In the case before us, as we have already mentioned, it was never suggested on behalf of the first defendant that several debts were due and owing to the plaintiff by them and that therefore it could not be taken that the payment of Rs. 5,000 each by drafts was towards a debt other than the debt due under the promissory note for Rs. 45,000. Of course there was the other debt due under the promissory note, dated 1st March, 1951 (Exhibit B-7); but that promissory note was not in favour of K. A. Appa Rao. It was in favour of the Shyamala Industries Corporation which is different in law from Appa Rao. It appears to be reasonably clear to us that these two drafts must have been sent to the plaintiff in part-payment of the debt due under the promissory note Exhibit B-4. The drafts were sent in June and July, 1951. Even leaving out of account Exhibits A-2, A-3 and A-4, there is the notice given by the plaintiff on 7th November, 1951 (Exhibit B-14) in which it was expressly stated that the sums sent by the two drafts were credited to the promissory note of Rs. 45,000. This notice was within three years from the date of the promissory note. The suit was filed in February, 1954, within three years from the date of the notice. There was clearly appropriation by the creditor towards the impugned promissory note within the prescribed time and that fulfils the condition that the payment should be on account of the debt. As the suit was instituted within three years from the date of these payments, the suit was not barred by time.

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1. (1886) I.L.R. 9 Mad. 271.

2. I.L.R. (1938) 2 Cal. 320.

It also follows that in calculating the amount due under the promissory note Exhibit B-4, the first defendant should be given credit to the two sums of Rs. 5,000 each, as well as to the sum of Rs. 2,000 sent by a demand draft subsequently. C.C.C. Appeal No. 15 of 1957 which relates to this promissory note is allowed only to the extent of Rs. 2,000 but is substantially dismissed. The appellant and the plaintiff-respondent will pay and receive proportionate costs.

In the other suit which has given rise to C.C.C. Appeal No. 16 of 1957, there was practically no defence except the plea of partial discharge on the ground that the three payments of Rs. 5,000 5,000 and 2,000 were made towards the promissory note on which this suit was based. As we have held that these payments must go towards the promissory note of Rs. 45,000 (Exhibit B-4), they cannot obviously be taken as payments made towards Exhibit B-7. The plaintiff is entitled to get a decree for the sum claimed by him. The appeal fails and is dismissed with costs.

C.C.C. A. No. 15 of 1957 having been set down for being mentioned this day, the Court made the following order :—

The decree of the lower Court shall be amended by substituting the value of the Indian currency for Rs. 45,000 Hyderabad currency for the principal amount namely Rs. 37,800. Interest will be calculated on this sum. It is represented that since the date of this decree of the Court below further payments have been made towards the amount due under the decree. Such payments, if any, will be given credit.

V.S. ——— *Appeals dismissed.*

[FULL BENCH].

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice*, MR. JUSTICE RAMACHANDRA IYER AND MR. JUSTICE GANAPATIA PILLAI.

K. S. Lakshmipathy Nayakar .. *Petitioner**

v.

The State of Madras represented by the Collector of Mathurai and another .. *Respondents.*

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), sections 12 and 15—Petition for grant of ryotwari patta—Scheme of—Irrigation tank in an estate—When private land of the landholder—Landholder, if entitled to grant of patta as of right in respect of such tanks.

In an estate as defined in the Madras Estates Land Act, 1908, tank bed is not a communal poramboke. The property in the tank situate within the ambit of the estate would naturally vest in the proprietor. But his rights would be restricted in a tank which is the source of irrigation for the lands in the estate. The landholder is under an obligation to preserve, maintain and repair such tanks and the ryots will have a right over the tank in the nature of easements. But there might be tanks in an estate in which the ryots would not have any rights customary or easementary. Such tanks would form the absolute property of the proprietor. In an ordinary ryotwari village it is not possible to conceive of the grant of a ryotwari patta with regard to a tank. As the object of the Madras Act XXVI of 1948 is to convert the zamindari estate into ryotwari tenure the provisions of the Act should be understood in relation to that purpose.

The scheme of sections 11 to 15 of the Act clearly shows that the right to a ryotwari patta in respect of the private lands of a landholder is a matter for adjudication by the Settlement Officer and the landholder has to make out his claim with reference to every field or survey number claimed by him.

An irrigation tank, though constructed on what was once the landholder's private land, could not be held to be his private land so as to entitle him to the issue of a ryotwari patta under section 12 of the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948. Such a right could not be justified on any theory of appurtenant or accessory rights. Whether the particular lands constitute private land has to be decided in each case. A landholder will not be entitled to the grant of ryotwari patta in respect of a tank merely because it is situate within the boundary of his private land. If it is found in an enquiry under section 15 of the Act, that having regard to its size and the quantity of water it is nothing more than a well or a pond the landholder will be entitled to have it included

*W.P. Nos. 42 and 62 of 1956 8th April, 1959.
(18th Chaitra of Saka—1881.)

in the patta of the land of which it is a part. If on the other hand, it is held that the tank is a source of irrigation for other lands, the tank would be Government property and the landholder will not be entitled to obtain a patta for the same although the land on which it stands or the sourrounding land may be the private land of the landholder and to which he may be entitled to a patta.

Srinivasa Rao v. *State of Madras*, (1956) 2 M.L.J. 595 : I.L.R. (1957) Mad. 436, overruled.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the respondent herein to forbear from interfering with the petitioner's rights, possession and enjoyment in any manner in respect of the tanks of Appasamudram and Melakulam within the limits of Idayakottai Zamin, Palani Taluk of the Madurai District in pursuance of the Memo. issued by the Collector of Madurai in L. Dis. No. 40431-G-55, dated 30th November, 1955.

V. Vedantachari and *V. C. Srikumar*, for the Petitioner in both the Petitions.

The Advocate-General (*V. K. Thiruvenkatachari*) and The Additional Government Pleader (*K. Veeraswami*) on behalf of the Respondents in both the Petitions.

The Order of the Court was delivered by

Ramachandra Iyer, J.—These are applications under Article 226 of the Constitution for the issue of a writ *mandamus* and *certiorari* respectively to direct the respondent to forbear from interfering with the petitioner's right, possession and enjoyment of the Melakulam and Appasamudram tanks within the limits of what was once Idayakottai zamin in Palani taluk in Madurai district, and to call for the records and quash the order of the Estates Abolition Tribunal, Madurai, in R.A. No. 19-1953, dated 14th July, 1953, which affirmed the order of the Settlement Officer, Madurai, dated 29th September, 1952, made in Case Nos. 9 to 14 PLN 51, holding that a ryotwari patta in respect of the tanks referred to above could not be granted to the petitioner. In view of the general importance of the questions raised, these petitions have been posted before a Full Bench.

The petitioner was the zamindar of Idayakottai which is situated in Palani taluk in Madurai district. The zamin was notified as a zamindari estate and taken over by the Government on 3rd September, 1951, under the provisions of the Madras Estates (Abolitition and Conversion into Ryotwari) Act (XXVI of 1948), which shall hereinafter be referred to as the Abolition Act or the Act. In due course the petitioner filed an application before the Settlement Officer, Madurai, under section 12 (*a*) of the Act for the grant of a ryotwari patta with respect to several items of lands which he claimed as his private or pannai lands. Amongst the several items claimed were, two tanks in the village known as Melakulam and Appasamudram. As the village has not yet been surveyed the tanks could be identified only by their Paimash numbers. Melakulam is covered by P. Nos. 330 and 331, while Appasamudram is covered by P. Nos. 489 and 490. In the village accounts they are mentioned and classified as water spread and tank bund area. The Settlement Officer granted a patta in respect of a number of items but rejected the claim of the petitioner in regard to the two tanks.

The petitioner filed an appeal against the order of the Settlement Officer under section 15 (2) of the Abolition Act, to the Estates Abolition Tribunal, Madurai. The Tribunal found that the two tanks came into existence long prior to Act I of 1908 on what was once the zamindar's pannai lands, but that they ceased to be the private lands on their being converted as tanks and that therefore the petitioner would not be entitled to the issue of ryotwari pattas in respect of them. The petitioner has thereupon moved this Court under Article 226 of the Constitution for the reliefs aforesaid.

In *Srinivasa Rao* v. *State of Madras*[1], a Bench of this Court held that where a tank was an accessory to or part and parcel of the private lands of a landholder, he would be entitled to the grant of a ryotwari patta for the tank under section 12 (*a*) of the Act. The correctness of that decision has been challenged before us by the learned Advocate-General on behalf of the Government.

1. (1956) 2 M.L.J. 595 : I.L.R. (1957) Mad. 436.

It is contended on behalf of the petitioner that where a landholder constructed on what were his private lands a reservoir for storing water for irrigating exclusively his private lands whether the reservoir was a well or a tank the lands so utilised for the reservoir would continue to be the private lands either as an ancillary to the remaining private lands or as part and parcel thereof. It was, therefore, urged that the landholder would be entitled to the grant of a patta in regard to the tanks as they formed really part of the other private lands in respect of which he was entitled to have a ryotwari patta.

Idayakottai was a zamin village governed by the provisions of the Madras Estates Land Act (I of 1908). It is not disputed that the two tanks of Melakulam and Appasamudram occupy a portion of what originally formed part of the private lands landholder and that the ayacut under the tanks is entirely comprised of the private lands of the landholder. None of the ryots of the zamindari had any right to the water from the two tanks. The question for consideration is whether in those circumstances, the tanks could be deemed to continue as private lands or at least considered to be so integrated with them as to entitle the landholder to a ryotwari patta even as regards the tanks.

It is necessary in this connection to refer to the relevant provisions of the Madras Estates Land Act (I of 1908).

Section 3 (10) of that Act defines "private land" as:

"(*a*) in the case of an estate within the meaning of sub-clauses (*a*), (*b*), (*c*) or (*e*) of clause (2) means the domain or home-farm land of the landholder by whatever designation known, such a kambattam, khas, sir or pannai and includes all land which is proved to have been cultivated as private land by the landholder himself, by his own servants or by hired labour, with his own or hired stocks, for a continuous period of twelve years immediately before the commencement of this Act......"

It is not necessary for the present purpose to refer to the remaining portion of that section which related to the case of an estate which became an inam after 1936.

Section 3 (16) defines 'ryoti land' thus :—

"'Ryoti land' means cultivable land in an estate other than private land but does not include (*a*) beds and bunds of tanks and of supply, drainage surplus or irrigation channel; (*b*) threshing floor, cattle-stands, village sites, and other lands situated in any estate which are set apart for the common use of the villagers; and (*c*) lands granted on service tenure either free of rent or on favourable rates of rent if granted before the passing of this Act or free of rent if granted after that date, so long as the service tenure subsists."

From the above definition of ryoti land the beds and bunds of tanks would not form part of a ryoti land. That would not necessarily mean that they would form part of the private land. The determination of that question would depend on the meaning of the term 'private land' as given in Act I of 1908.

Neither the word 'tank' nor the words 'tank bed' are defined either under the Madras Estates Land Act (I of 1908) or under the Abolition Act. In ordinary parlance a tank may denote any depression storing water varying in size from a pond to a lake. Ordinarily a tank is closed by an embankment on all sides consisting of earth or masonry or both. In an estate the tank bed is not communal poromboke. The property in the tank bed situate within the ambit of the estate would naturally vest in the proprietor. But his rights would be restricted in a tank which is a source of irrigation for the lands in the estate. Such a tank should be preserved as such, and the landholder would have no power to destroy the same but would on the contrary be bound to maintain and repair it. The right of the ryots in regard to such tanks would be in the nature of easements, but not a proprietary one. Vide *Ramaswami* v. *Ramaswami*[1].

But there might be tanks in an estate in which the ryots would not have any rights customary or easementary. Such tanks would form the absolute property of the proprietor. The claim in the present case on behalf of the petitioner is that the

1. (1942) 2 M.L.J. 595 : I.L.R. (1943) Mad. 331.

two tanks of Melakulam and Appasamudram were the absolute properties of the proprietor with no rights outstanding in the ryots and that therefore an appropriate patta should be granted to him in respect of them.

The Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948) was passed with the avowed and declared object of abolishing the permanently settled estates and for the introduction of ryotwari tenure in those areas. Under the ryotwari system all arable lands, whether cultivated or waste, are divided into blocks and granted to individuals acting on their own account without a middleman. The State, however, does not grant any title-deed to the ryot but it only grants a ryotwari patta, which has not been understood to be any conferment of title but only as indicating a certain fiscal arrangement between the Government and the individual concerned. The terms of the engagement are the payment to the Government by the pattadar of a tax which is fixed on the basis of a periodical settlement. In addition, the ryot would be bound to pay the Government a tax for the water supplied by the Government for the irrigation of the land covered by the patta. The obligation of the Government is to supply necessary and sufficient water for the accustomed requirements of the ryotwari pattadar and subject to that, the sovereign and paramount right of the Government to distribute water is absolute. A ryotwari proprietor has no right to prescribe the source from which the water should be supplied, though he could insist on the existing arrangements continuing till the Government provides an equally efficient supply. The underlying idea of that system is that the irrigation sources belong to the Government, the ryotwari pattadar being only the holder of the land and his right being only to obtain the accustomed supply of water with no specific right in regard to the source from which such water is supplied. It is, therefore, not possible to conceive of the grant of a ryotwari patta with regard to a tank in an ordinary Government village.

As the object of the Abolition Act is to convert the zamindari estate into a ryotwari tenure eliminating the middlemen, namely, the zamindars, the provisions therein should be understood in relation to that purpose. Broadly stated, the effect of the statute is : On notification of the estate under the Act, the entire estate (including all communal lands and porambokes, other non-ryoti lands, waste land, pasture land, lanka land, forest lands, etc., rivers and streams, tanks and irrigation works, fisheries and various other rights) would stand transferred to the Government and vest in them free of all encumbrances, and the Madras Revenue Recovery Act, the Madras Irrigation Cess Act, and all other enactments applicable to the ryotwari areas be applicable to the erstwhile estate. The result of the notification would be to vest the entire estate in the Government and the proprietor would be entitled only to a compensation. Provision is, therefore, made under the Act for the notification and taking over the estate, appointment of Settlement Officers and Tribunals, the grant of pattas, adjudication of disputes and compensation to be paid to the proprietor for expropriation of his land. Section 11 specifies the land in which the ryot would be entitled to a ryotwari patta. Section 12 specifies the lands in the zamindari estate in which the landholder would be entitled to a patta. Section 13 concerns itself with the lands in an inam estate, while section 14 with under-tenure estate. As regards the grant of a ryotwari patta in regard to private lands the relevant portion of section 12 is this :

"12. In the case of a zamindari estate, the land-holder shall with effect on and from the notified date, be entitled to a ryotwari patta in respect of (*a*) all lands (including lanka lands) which, immediately before the notified date, (i) belonged to him as private land within the meaning of section 3, clause (10) (*a*) of the Estates Land Act, or (ii) stood recorded as his private land in a record prepared under the provision of Chapter XI or Chapter XII of the said Act, not having been subsequently converted into ryoti land.........."

Section 15 (1) states,

"The Settlement Officer shall examine the nature and history of all lands in respect of which the landholder claims a ryotwari patta under section 12, 13 or 14 as the case may be, and decide in respect of which lands the claim should be allowed."

Sub-section (2) of section 15 provides an appeal to the Appellate Tribunal. Section 16 makes every person who becomes entitled to a ryotwari patta liable to pay the

assessment, etc., to the Government. Section 21 authorises the survey of estates : Sub-section (1) of that section states :—

"Any estate or part thereof may be surveyed, or, if it has been surveyed before the notified date may be resurveyed, as if it were Government land, in accordance with the provisions for the survey of such land contained in the Madras Survey and Boundaries Act, 1923.

Provided that any resurvey made under this sub-section may be limited to what is necessary for the introduction of the ryotwari settlement in the estate or part thereof."

Sub-section (2) of that section states,

"The cost of the survey or resurvey, except so much thereof as is payable by the ryots or the landholder under the provisions of section 8 of the Madras Survey and Boundaries Act, 1923, shall be borne by the Government."

Section 22 prescribes the manner of effecting the ryotwari settlement of the estate. Section 67 enables the Government to make rules to carry out the purposes of the Act.

Under the authority vested in section 67 the Government have framed rules for the working of the Act. In particular rules have been framed by the Government on 31st October, 1950, in regard to the grant of patta to the landholder. Those prescribe, that every landholder claiming a ryotwari patta under sections 12, 13 or 14 as the case may be, should apply in writing to the Settlement Officer within six months from the notified date or within 2 months from the date of publication of the rules whichever was later. Every such application should be in a Form specified in the Appendix to the Rules. That Form directed the landholder to specify, among other things, the local name, if any of the land, survey number and sub-division, extent in acres and cents, classification wet or dry and survey numbers of the boundaries and the summary of evidence proposed to be adduced in support of the claim. It is clear from section 15 and the Rules and the Form prescribed that, the right to a ryotwari patta in respect of the private lands of a landholder is a matter for adjudication by the Settlement Officer, and that he has got to make out his claim with reference to every field or survey number claimed by him.

We have then to consider whether an irrigation tank though constructed on what was once the landholder's private land could be held to be private land. Mr. Vedantachariar, the learned advocate for the petitioner, first contended that as the tank was in origin a private land the landholder would be entitled to a ryotwari patta as the tank was essentially a land containing water and as a private tank it should be held to be private land. The contention was reinforced by reference to certain authorities which held that the word 'land' included in its conception water thereon. Reference was also made to a passage in Coulson and Forbes on "Weters and Land Drainage", 6th edition, page 124, where it is stated ;

"It does not appear that by the English law there is any difference as to the ownership of the soil between land covered with still and running water. Where, therefore, a lake or pool lies wholly within, and is surrounded by a manor or estate, the presumption is that the owner of the manor or estate is also the owner of the soil of the lake ; and where the boundary of two properties passes along the pool, it is taken to coincide with the *medium filum* of the pool ; although, of course, it may be proved expressly to have some other direction."

From this it is contended that as the term 'land' also includes a land over which water is stored, a tank should be held to be a land, and the ownership being in the proprietor with no outstanding claim thereto in anybody else, it should be held to be private land. We cannot agree with this contention. The term 'private land' in Act I of 1908 has a statutory meaning given to it. It cannot be interpreted to mean a land which is private ; and then taking the meaning of the word 'land' as including a tank, to treat private tank as private land within the meaning of the statutes.

It is then contended that the tanks in the present case were appurtenant to the cultivated private lands of the petitioner, and that therefore if the cultivated portion of the lands were to be granted a ryotwari patta in favour of the petitioner, the appurtenant rights of irrigation should also pass to him.

In *Sadhu* v. *Bihari Singh*[1], there was a house which was appurtenant to an agricultural holding of a village. That village was divided between two co-sharers with the result that the house of the tenant was within the portion owned by one co-sharer while right over the agricultural holding fell to the other sharer. The co-sharer landlord in whose share the house of the tenant fell sought to eject him on the footing that the tenant had no agricultural land within the property allotted to his share. The claim was rejected on the ground that the partition between the two co-sharers effected no change in the position of the tenants and so long as he was in possession of the occupancy holding he could not be ejected from the house as that house was a part of the holding and appurtenant to his agricultural holding.

In *Babu Lal* v. *Ram Prasad*[2], it was held that the phrase 'appurtenant to an agricultural holding' meant something which was adjunct to or part and parcel of the holding. In its secondary sense it meant what was usually enjoyed with and not in the sense of a right of easement. In that case two plots of abadi land were in possession of the tenant from the times of their ancestors, who had been occupancy tenants, and were used for the purpose of tethering cattle storing manure, etc. It was held that in the absence of the evidence regarding the origin of the tenancy or of the possession of the plots by the tenants the plots should be regarded as appurtenant to the holding and that so long as the tenancy subsisted the landlord was not entitled to sue for possession of the plots.

In *Srinivasa Rao* v. *State of Madras*[3], it was held that where a parcel of land was held by a person for cultivation with a tank upon it the tank would go with the land and that if there was patta for the land there should be a patta for the tank as appurtenant thereto.

In our opinion, it would be difficult to justify the claim of the landholder to a ryotwari patta in respect of an irrigation tank on any theory of appurtenant or accessory rights. The relation between principal and accessory rights is the converse of that existing between servient and dominant rights. In either case the owners should be different. One right can be adverse to another only if it is vested in a different owner. This would apply even in regard to a beneficial right to arise out of another property. The accessory right would be a beneficial right to the owner of the property. Where the owners of the two properties are the same no question of accessory rights would at all arise for the simple reason that the person who has the higher rights of ownership in regard to both the properties could not (and hardly could have even intended to) create a right against himself. It follows that where the proprietor was entitled to all the lands within the ambit of his estate (except of course the ryoti lands in respect of which he would only have the melwaram rights) no question of accessory rights in regard to a particular plot of land can arise in relation to another part of the property of the proprietor. This would be so even adopting the extended meaning given to appurtenant rights in *Babu Lal* v. *Ram Prasad*[2].

It was next contended that the tanks having been constructed for the irrigation of the private lands of the landholder they should be held to form part and parcel of the private lands and a ryotwari patta granted on that basis. In support of that contention the analogy of issuing patta to a ryot under section 11 was relied on. Under section 11 of the Act a ryot would be entitled to a ryotwari patta in respect of the ryoti lands properly included or which should have been properly included in his holding. If a ryot were to construct a tank upon a portion of the holding, it would be an improvement to the ryot's holding within the meaning of section 3 (4) of Act I of 1908, and it would only enhance the value of the holding rather than cease to be a ryoti land. It would not vest in or revert to the landholder, on the ground that not being cultivable land it could not properly be within his holding. It is contended that as in such a case the ryot would be entitled to the patta in respect of the tank, in the case of private lands also, a tank constructed within the area of the private lands of the landholder, should be considered to be an improvement to the private lands and therefore should go with them. It must be pointed out that a tank cons-

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1. (1908) I.L.R. 30 All. 282 (F.B.).
2. I.L.R. (1939) All. 67 (F.B.).
3. (1956) 2 M.L.J. 595 : I.L.R. (1957) Mad. 436.

tructed on a ryoti land is considered to be an improvement by virtue of a statutory definition for certain purposes mentioned in the statute. It cannot be stated that under the general law an irrigation tank would form part of the contiguous lands. It is unnecessary for the purposes of this case to consider whether after a notification under Act XXVI of 1948 a ryot on whose property an irrigation tank is situated would be entitled to a ryotwari patta for it on any theory of improvement. Even so, in our opinion, that concept of an improvement within a holding would not apply to the case of private lands as the landholder could not be treated as having a holding under any person so as to protect his right as against him on any basis, statutory or otherwise and to consider a tank constructed by him on his own property as an improvement of any particular portion of his property. There is no warrant for such a theory either on principle or on the statutes. The tank would be the property of the landholder as much as the other private lands are, and there is no need to justify his ownership thereof on any theory of improvement. It is then contended that the tank should be held to be a part of the holding on the principle of certain decisions to be referred to presently.

The learned advocate for the petitioner referred to the decision in *Nidhi Krishna Bose* v. *Ram Doss Sen*[1]. In that case there was a lease of a tank. The property of the proprietor was purchased by another person and the purchaser sought to evict the lessee of the tank. The latter pleaded that he had a right of occupancy in the tank. Couch, C.J., observed :

"Where land is let for cultivation, and there is a tank upon it, the tank would go with the land; and if there was a right of occupancy in the land, there would be a right of occupancy in the tank as appurtenant to the land. But here the tank is the principal subject of the lease, and only so much land passed with the tank as is necessary for it, namely, for the banks. This in reality is the tank and according to the decisions there cannot be a right of occupancy acquired in it."

The learned Chief Justice held that the lessee did not acquire a right of occupancy in the tank. This decision is relied on as indicating the possibility of a tenant acquiring an occupancy right over a tank when it was part of the demise of agricultural lands.

The decision in *Surrendra Kumar* v. *Chanderatara Nath*[2], was next relied on. Referring to the decision in *Nidhi Krishna Bose* v. *Rama Doss Sen*[1], Mitter, J., observed :

"The true test as to whether the lease is for agricultural purposes or not is to see whether the primary object was the lease of the tank or lease of the land surrounding it for purposes of agriculture with tank within it. In this respect the area of the surrounding land is an important factor to be considered."

It was held in that case that the lease was of both the tank and the banks and that the tenant would get an occupancy right.

In *Sobharam* v. *Raja Mahton*[3], this view of the Calcutta High Court was accepted by the Patna High Court.

The decision in *Srinivasa Rao* v. *State of Madras*[4], accepted the claim of the landholder to a tank patta even on this footing.

In *Rangaraju* v. *State of Andhra*[5], it was held that if there was proof that the whole of a block of land had been enjoyed as private land, the mere fact that a small portion of it constituting an integral part thereof was used for purposes other than cultivation did not make that part any other than a private land, and that it would be reasonable to infer that the whole block of land as a unit was reserved by the landholder himself for the purpose of cultivation.

In our opinion the question has got to be decided not on the basis that an item of property in respect of which a ryotwari patta is claimed was a part of a holding or of a block of lands but as to whether that item would be private land as defined in the Madras Estates Land Act, 1908. The Abolition Act vests the entire estate in the Government after a notification is made. The landholder would be

1. (1873) 20 Weekly Reporter 341.
2. A.I.R. 1931 Cal. 135.
3. (1957) I.L.R. 36 Pat. 471.
4. (1956) 2 M.L.J. 595 : I.L.R. (1957) Mad. 436.
5. A.I.R. 1958 Andh. 375.

entitled to patta only in respect of the 'private' land contemplated in section 12 (*a*). In the case of a ryot there will not be much difficulty in ascertaining the extent of his holding as in all estates accounts are kept with regard to each holding. But this is not an universal practice in regard to the landholder's private lands. The question whether a particular item of property was on the date of the notification the private land of the landholder has to be decided in each case.

It is argued that if in regard to a well situated within the land, it could be held that the landholder would be entitled to have a patta for the land on which the well is situated, there could be no difference in principle if a patta is sought in respect of a land in which a tank is situated. Such an argument though it looks plausible cannot, however, be accepted. There are various types of irrigation sources in our country, such as wells, tanks, ponds and lakes. The acceptance of such a principle would lead to anomalies and practical difficulties. For example: The landholder could after obtaining patta treat the tank as his own, convert it into arable land if possible and insist on the Government providing irrigation for all his lands. Once patta is granted there would be no obligation on him to maintain it as an irrigation source. Even if the tank is retained as an irrigation source it would create within a ryotwari village, a separate system of irrigation in regard to a portion of the village, while the others would be looking up to the Government for irrigation of their lands. If in later years the property of the erstwhile landholder comes to vest in various persons by inheritance or alienation, the distribution of water from the private tank would be a matter of conflicting claims and disputes. Distribution of water to a part will have to be in the hands of private individual in regard to those lands while the rest of the village would depend on the Government. Further if this principle were to be accepted, it would mean that big tanks and lakes would necessarily have to vest in the erstwhile proprietors who were entitled to pattas in respect of the private land alone. That obviously could not have been the intention of the legislature. In this method of approach to the question, *viz.*, the appurtenance and part and parcel theory it would always be difficult to draw the line as to in what cases the landholder would be entitled to a patta in respect of an irrigation tank or other reservoir.

The Act has proceeded to solve the difficulty by directing a judicial or quasi-judicial investigation under section 15 of the Act. The survey contemplated by section 21 would place in the hands of the Settlement Officer and the Tribunal enough details to ascertain whether a disputed item of property was a well or pond or an irrigation tank. If it is decided that it was an irrigation tank, it could not be held to be a private land. The essence of a private land is that it should have been cultivated and no irrigation tank could be held to have been cultivated land. In such a case the landlord would not be entitled to a patta for it. The wording of section 3 (*b*) of the Abolition Act vests all irrigation works in the Government. But a right to ryotwari patta is created only in respect of private lands, and that too after an investigation whether they were such lands on the date of the vesting. Viewed from another aspect, the same conclusion would seem to follow. What is claimed is a ryotwari patta. The incidents of a ryotwari tenure to which reference has been made already would indicate that irrigation sources belong to Government and should belong to the Government, for then alone it could be able to direct an equitable distribution of water amongst the various pattadars. Further, ownership of the irrigation sources provide an important head of taxation, which would bring increasing revenue to the state as and when more and more lands are cultivated.

With great respect to the learned Judges who decided *Srinivasa Rao* v. *State of Madras*[1], we are unable to share their view that a landholder's right to obtain a ryotwari patta for an irrigation tank under section 12 (*a*) of the Abolition Act could be supported either on the theory of appurtenant rights or that the tank formed part and parcel of the private lands of the landholder. In our opinion, the provisions of section 15 of the Abolition Act and the Rules made under the Act, indicate that

1. (1956) 2 M.L.J. 595 : I.L.R. (1957) Mad. 436.

the intention of the legislature was not to entitle the landholder to obtain a ryotwari patta for a tank merely for the reason that it was situate within the boundaries of his private land the question in the first instance would be a matter for judicial adjudication under section 15. If it is found that having regard to its size and the quantity of water in the reservoir, it was nothing more than a well or a pond, the landholder would be entitled to have it included in the patta for the land of which it is a part. If on the contrary it was held that the tank was really an irrigation source for other lands although all of such lands would be included in a patta to be granted to the landholder, the tank would be Government property and the landholder would have no right to obtain a patta for the same.

In the present case the Tribunal has after considering the evidence, come to a conclusion that the landholder would not be entitled to a ryotwari patta in respect of the tanks. We are not shown as to how that finding, which is within the jurisdiction of that Tribunal could be challenged in these proceedings.

The result is, the petitions fail and are dismissed. There will be no order as to costs.

R.M. ——— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE BALAKRISHNA AYYAR.

M.L.M. Muthiah Chettiar .. *Applicant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922)—Business in money-lending—Malayan Ordinance reviving old debts paid in occupation currency—Subsequent payments received by creditors and payments made by them to their creditors under the Ordinance—Liability to tax—Extent of.

When Malaya was under the occupation of the Japanese between 1942 and September, 1945, the Japanese issued their own currency which circulated along with the Malayan currency. The Japanese currency began to depreciate in January, 1943 and by September, 1945, it ceased to have any value. The British Government after their re-occupation of Malaya in September, 1945, declared a moratorium on all private debts. The Government of India, notified on 14th August, 1947, a scheme in respect of income-tax intended to give a measure of relief to the Indian nationals doing business in Malaya.

On 16th December, 1948, the Malayan Legislature passed an Ordinance intended to regulate the relationship between creditors and debtors in respect of debts incurred (1) prior to the Japanese occupation and (2) during the occupation.

Subject to certain provisions the Ordinance directed that any pre-occupation debt which remained wholly unpaid at the time the Ordinance commenced was to be paid in full. Subject again to certain provisions, payment of a pre-occupation debt either in Malayan or Japanese currency made before 31st December, 1943, was to be a valid discharge to the extent of the face value of the payment. In other cases payments in Japanese currency were to be revalued and scaled down in accordance with the schedule annexed to the Ordinance. A debtor who had paid any debt in depreciated Japanese currency was required to pay over again a certain amount to be ascertained by the application of the schedule.

On the strength of the Ordinance several assessees were able to obtain or enforce further payments in respect of debts which had been discharged fully or in part by payment in Japanese currency. On the other hand, in pursuance of the Ordinance the assessees were required to make further payments to their creditors. On the question of the liability to pay income-tax in both these instances:

Held, the sums which a money-lender has received in re-payment of the principal cannot be subject to tax; conversely, he cannot claim that the amounts he has repaid as principal should be treated differently and that the amounts so repaid should be deducted from his profits. The two items, that is, repayments of principal received by the money-lender and repayments of principal made by the money-lender must both of them be excluded.

The payments were made in depreciated currency and though the payments discharged the debts in accordance with the law at the time of the payment, the result of the Ordinance was to revive the old debt. The subsequent payments cannot be in the nature of accretions to profits.

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* R.C. Nos. 59 of 1954, 33, 42, 43, 58, 59, 60, 64, 65, 75 and 82 of 1955 and 97, 98, 102, 112, 113 and 115 of 1956 and 64 of 1957. — 19th August, 1958. (28th Sravana, 1880—Saka)

The difference between payments made towards interest on the money borrowed and payments made in repayment of the principal borrowed must also be not overlooked.

Where an assessee has received repayments he will not be liable to tax in respect of amounts he has received as or towards principal; but he will be so liable in respect of monies which he has received as or towards interest. Where only part of the debt has been recovered, the assessee will be at liberty, subject to the law relating to appropriation of payments, to appropriate the money he has received either towards principal or interest. If the payment has been lawfully appropriated towards interest the assessee will be liable to pay tax thereon. If it is towards principal he will not be liable.

Where an assessee has made payments he will be entitled to deduct from his income and claim exemption from tax for only such amounts as he has paid on account of interest. He will not be entitled to deduct any payments on account of principal.

A bad debt is a debt which has become irrecoverable owing to the financial position of the debtor or for other reasons but debts repaid in occupation currency cannot be described as bad debts.

Rights and liabilities arising from the fact that a particular assessee has accepted a scheme or offer made by the Government of India cannot be enforced as if they arose under the Indian Income-tax Act, such rights and liabilities since they arise from contract must be adjusted or enforced otherwise. The scheme or offer would stand outside the Act.

Petition under section 66 (1) of Act XI of 1922 as amended by section 92 of Act VIII of 1939 praying that in the circumstances stated therein, the High Court will be pleased to direct the Income-tax Appellate Tribunal, Madras Bench 'B', to state a case and refer to the High Court in R. A. No. 399 of 1953-54 (I.R.A. No. 6114 of 1952-53 on its file for decision on the following question of law,

"whether the second payment of $ 15,977·18 made by the assessee to his creditors on account of fluctuations in the rate of currency exchange and on account of the Debtor and Creditor (Occupation Period) Ordinance, 1948, is an admissible deduction?".

R. Kesava Ayyangar, S. Swaminathan, M. Subbaraya Ayyar, V. Sethuraman, S. Padmanabhan, P. R. Ranganathan, G. R. Jagadisan, S. V. Subramanyam, G. Vasantha Pai, K. Srinivasan, D. S. Meenakshisundaram and *N. Srivatsamani*, for Applicant.

The Advocate-General (*V. K. Tiruvenkatachari*) for *C. S. Rama Rao Sahib*, Special Counsel for Income-tax, on behalf of the Respondent.

The Court delivered the following

JUDGMENT.—Certain facts and circumstances are common to all these cases and we shall set them out first.

Between February, 1942 and September, 1945, Malaya was under the occupation of the Japanese. During this period the Occupying Power issued its own currency in dollars and this currency circulated side by side with the previous Malayan currency which was also in dollars. In 1948, the Malayan Legislature enacted an Ordinance to which reference will be made presently. The Schedule to that Ordinance shows that up to end of December, 1942, the new Japanese currency and the old Malayan currency circulated at par. In January, 1943, the Japanese currency began to depreciate and in December, 1943, one hundred old Malayan dollars where equivalent to 385 new Japanese dollars. In 1944, the depreciation became more rapid with the result that in December, 1944, one hundred old Malayan dollars were equal to 1,850 new Japanese dollars. From January, 1945 the rate of depreciation became almost a landslide. On 1st August, 1945, one hundred old Malayan dollars were equal to 10,500 new Japanese dollars. On 8th August, 1945, one hundred old Malayan dollars were equal to 55,000 new Japanese dollars. By 13th August, 1945, the Japanese dollars ceased to have any value.

Soon after they reoccupied Malaya in September, 1945, the British Government declared a moratorium on all private debts. A large number of Indian nationals were doing business in Malaya before the Japanese occupation, during the Japanese occupation and also thereafter and they sustained heavy losses during and on account of the occupation. In response to representations made on their behalf, the Government of India notified on 14th August, 1947, a scheme intended to give them a measure of relief. The main features of the scheme so far as here material were these:

(1) No assessee was under any obligation to accept the scheme: he was free either to opt or it or not. If he desired to opt for the scheme he was required to exercise his option within a month after he was informed of the scheme.

(2) The assessee was permitted to include in his expenses various items which would be inadmissible under the Indian Income-tax Act.

(3) The losses suffered by the assessee during the five years relevant to the assessment years 1942-43 to 1946-47 were all to be aggregated.

(4) The asessee was permitted—reversing the usual procedure fixed in the Indian Income-tax Act—to carry this aggregated loss backwards and set it off against his profits for the assessment year 1942-43.

(5) If there was any loss still unabsorbed the assessee was permitted to carry this loss—again backwards—to the year 1941-42.

(6) Any excess tax found to have been paid after recomputing the income of the assessee by carrying his losses backwards would be refunded to him.

(7) The loss could not be carried forward.

The Central Board of Revenue issued further instructions in respect of the scheme ·

(1) Where proper and complete accounts existed the profits and loss was to be determined in accordance with the accounts. Where proper accounts were not available a comparison of the balance-sheets at the beginning and at the close of the period was to be made for determining the profit.

(2) Appreciation or depreciation or loss of capital assets was to be ignored.

(3) Where a debtor of the assessee repaid him in Japanese currency the amounts so paid would not be treated as an asset of the assessee and would be excluded from the assets side in the balance sheet. This was, however, subject to one important qualification, *viz.*, 'if any recovery is subsequently made, it will be taken as income'. In like manner, where an assessee had paid his debts in Japanese currency the debts would be treated as having been satisfied to the extent of the payments and excluded from the liabilities side in the balance-sheet. This too was subject to the proviso that "if the payments made are not recognised by the Court and as a result of the Court's orders a further payment has to be made, this payment will be taken into account in the assessment of the year in which the payment is made."

(4) Any tangible asset taken in satisfaction of debts and subsisting at the close of the period would be valued at a reasonable rate.

It may be explained here that the scheme proceeds on the basis that Japanese currency whether kept in the till or in the bank was of no value after September, 1945.

On 16th December, 1948, the Malayan Legislature passed the Ordinance of which mention was made earlier, and, that Ordinance took effect from 1st October, 1949. It was intended to regulate the relationship between debtors and creditors in respect of debts incurred (1) prior to the Japanese occupation, and (2) during the Japanese occupation. Subject to certain provisions, section 3 directed that any pre-occupation debt which remained wholly unpaid at the time the Ordinance commenced was to be paid in full. Subject again to certain provisions and conditions, payment of a pre-occupation debt, either in Malayan currency or in Japanese currency, made before 31st December, 1943, was to be a valid discharge to the extent of the face value of the payment. In other cases payments in Japanese currency were to be revalued and scaled down in accordance with the Schedule annexed to the Ordinance. A debtor who had paid any debt in depreciated Japanese currency was required to pay over again a certain amount to be ascertained by the application of the Schedule. Section 13 expressly excluded from the scope of the Ordinance agreements made between a creditor and a debtor after the end of the occupation period for the purpose of—

"(*a*) valuing any payments made during the occupation period in respect of a pre-occupation debt or an occupation debt (whether accrued due or not); or (*b*) providing for payment or settlement of any pre-occupation debt or occupation debt or part thereof; or (*c*) determining the rate for payment of any such interest as is referred to in sub-section (1) of section 10 of this Ordinance".

The cases now before us fall into two categories. On the strength of the Ordinance several assessees were able to obtain or enforce further payments in respect of debts which had been discharged wholly or in part by payment in Japanese currency, and, on all these sums, they have been assessed to tax. The assessees questioned the legality of the levy. What is the extent of their liability to pay tax on these amounts is the question raised by one category of cases. On the other side, in pursuance of the

very same Ordinance, the assessees were required to make further payments to their creditors. In respect of such payments what relief from tax are the assessees entitled to? That is the real question raised in the second category of cases.

The facts in R.C. No. 59 of 1955 may be taken as typical of the cases in the first category. The assessee in that case was a resident firm with a money-lending business in Kampar in Malaya. Between 1942 and 1945 the assessee realised various amounts in Japanese currency. The assessee also opted for the Special Scheme notified by the Government of India, and, for purposes of the scheme the loss of the assessee was computed at $ 85,200 being the equivalent of Rs. 1,33,125. The assessee had made a profit of Rs. 35,753 and Rs. 35,010 for the assessment years 1942-43 and 1941-42 respectively. As the losses exceeded the total profits for those two years those profits were treated as nil and the tax paid by the assessee for those two years was refunded to him. After the Ordinance took effect the assessee collected $ 6,437 during the year ended 12th April, 1952. The Income-tax Officer observed :

"These are amounts recovered from debtors who discharged their loans during the occupation period. Since these loans were discharged earlier any second receipt from such debtors are only income assessable to tax."

On this reasoning he held that the assessee was liable to pay tax.

The Appellate Assistant Commissioner allowed the appeal which the assessee preferred before him. The reasons he gave were :

"In this case in accordance with that Ordinance what he received from the debtors had to be scaled down and the difference had to be realised in normal currency. That came to $ 6,437. It was only a realisation of the original amounts lent. It is not income."

The department appealed to the Income-tax Appellate Tribunal. The Tribunal allowed the appeal for these reasons :

"In the computation made by the assessee for purposes of claiming benefits under the scheme, it included and claimed all its cash and bank balances in Malayan business as part of the losses incurred therein. These cash and bank balances included the recoveries in full in the then Japanese currency of the debtors in question. In our opinion, this claim constitutes by itself a write-off of the debts, though indirectly, with the result that subsequent recoveries thereof amount to only bad debt recoveries normally assessable. The Appellate Assistant Commissioner's order is consequently set aside and the sum $ 6,437 is accordingly restored to the assessment."

The assessee then came to this Court and at his instance this Court required the Tribunal to state a case on the following question of law :

"Whether on the facts and in the circumstances of the case the recovery of the sum of $ 6,437 could be deemed to be the recovery of bad debts as viewed by the Appellate Tribunal and assessable as such."

It is unnecessary for us to summarise the facts in the other cases falling in this category since, as we have already explained, the facts here are typical and illustrative and the questions raised in those references notwithstanding differences in phrasing are also in substance the same.

R. C. No. 43 of 1955 is a case in the second category and the facts there were as follows. The assessee was carrying on a money-lending business at Kualakubba Bharu and Paritbunter in Federated Malay States. The assessee borrowed various sums of money before 12th April, 1942, on which date the Japanese occupied the country. Some of these debts were repaid in full in Japanese currency. After the country was re-occupied by the British and the Ordinance was issued, the assessee had to make various further payments to his creditors. The further payments that he had to make amounted to $ 28,586.72 for the year ended 13th April, 1951 and $ 11,574.31 for the year ended 12th April, 1952. The assessee claimed that these amounts were legitimate deductions from his income and should not be assessed to tax. The Income-tax Officer overruled the objection remarking :

"Payments to creditors whose accounts have been settled during the occupation period and who have claimed again under Debtor-Creditor Ordinance. These are only repayment of capital."

The Appellate Assistant Commissioner dismissed the assessee's appeal holding that,

"payments to creditors on account of the Debtor-Creditor Ordinance amounted to only repayments of the original loans taken and therefore they will not be admissible losses for income-tax purposes."

The Tribunal agreed with the view of the department :

"By virtue of the provisions of the Ordinance the repayment of creditors during the occupation period in Japanese currency was not accepted as full discharge in certain circumstances but limited to the scale laid down in the schedule thereto. In this view, the amount due and outstanding, which had subsequently been repaid, can only be said to represent a liability of the business as at the date of re-occupation, even though in the books, such a liability did not appear. The re-payments to creditors in both the years presently in question are consequently of a capital nature and cannot therefore be deducted from the profits. The argument that the payments in question have been necessitated by and the incidental loss incurred on account of fluctuations in exchange rates is hardly tenable, as no exchange rates are involved in the present consideration."

At the instance of the assessee the Tribunal referred the following question for the decision of this Court :

"Whether the payments of $ 28,586 and $ 11,547 are deductible from the foreign profits o assessment years 1951-52 and 1952-53, respectively."

The questions raised in the other references in this group are the same in substance.

No long arguments based on the Special Scheme propounded by the Government of India were advanced before us, and so the scheme itself can be dealt with very briefly.

From a purely legal point of view the scheme was in the nature of and constituted an offer by the Government of India which when accepted by the assessee brought into existence an agreement between the Government and the assessee. But, the liability of the assessees in these cases—and in fact of all persons—to pay Indian Income-tax is created by the provisions of the Indian Income-tax Act. The amounts on which the tax has to be paid, the rates at which the tax has to be computed and the reliefs which assessees are entitled to, must all be determined in accordance with the provisions of the Indian Income-tax Act and the relevant Finance Acts. If, under these Acts, no liability to pay tax arises in respect of any sums of money which the assessee may have received, he cannot be required in assessment proceedings to pay tax on that amount merely because he has opted for the scheme notified by the Government of India whereunder such sums are to be treated as his income. This is because of the general rule that liability to pay a tax like the Income-tax must be created by statute and cannot be founded on agreement. Rights and liabilities arising from the fact that a particular assessee has accepted the scheme or offer made by the Government of India cannot be enforced as if they arose under the Indian Income-tax Act. Such rights and liabilities since they arise from contract must be adjusted or enforced otherwise. To put it in another way, the scheme stands outside the Act.

When during the course of hostilities an enemy Sovereign Power brings any territory under its occupation and during such occupation it issues its own currency, such currency would ordinarily be legal tender and has got to be accepted in payment of obligations. Payments in such currency would therefore *pro tanto* discharge a debt. But in the present case the Japanese authorities issued their notes in such large numbers and in such a manner that the value of the currency depreciated rapidly and steeply till a stage was reached when it was worth nothing at all. The British Government which returned to Malaya first declared a moratorium and then enacted the Ordinance. The result of the Ordinance was to reopen debts and obligations which would otherwise have been treated as discharged in whole or in part because of the payments made in Japanese currency. The Legislature declared that payments made in Japanese currency would be treated as valid payments only in a fractional degree. It directed that though occupation notes whose face value aggregated to a certain amount had been paid, still those notes would be treated as having been worth only a fraction of their face value. It further provided that the amount of the fraction should be ascertained in accordance with the Schedule appended to the Ordinance. This meant that to the extent that the Ordinance declared

that there had been no valid discharge, the original debt was revived. Thus if *X* had borrowed 1,010 dollars from *Y* before the occupation and if in discharge of that debt *X* paid 1,010 Japanese dollars in July, 1944 to *Y* the debt would be wiped out under the law as it then stood. The Ordinance, however, directed that this payment of $ 1,010 was to be treated as a payment of only 100 Malayan dollars. This meant that the debt was revived to the extent of $ 910. Putting the matter in general terms, what the Ordinance did was to restore the original debt to the extent that it abridged or abrogated the discharge that had been made in Japanese currency. From this it would follow that repayments subsequently made in discharge of the debt that was thus resuscitated would have to be treated as partaking of the same character as the original debt. If the original debt revived by the Ordinance comprised only the principal, the repayment received would have to be regarded as receipt on account of the principal. If it comprised only interest the repayment would have to be regarded as receipt on account of interest. If the original debt comprised both principal and interest and was paid in full there would have been a receipt on account of both principal and interest. But if the repayment was only partial then there would be a receipt on account of principal or interest according as the amount has been lawfully appropriated to one head or the other.

The learned Advocate-General cited two cases to show that payments made in connection with an obligation, payments which at one time were not contemplated at all, must be treated as payments on account of the original obligation and treated for tax purposes as such.

The first is reported in *Taxation Commissioner of Australia* v. *Squatting Investment Company, Ltd.*[1] The material facts there were as follows : A company called the Squatting Investment Company, Ltd., carried on business as growers of wool in Australia during the years 1939 to 1946 inclusive. The wool they produced was compulsorily acquired by the Commonwealth of Australia in order that the Australian Government might be able to carry out certain commitments which it had entered into with the Government of the United Kingdom. One term of the agreement between the two Governments was that they would divide equally between them any profit arising from the re-sale of the wool outside the United Kingdom. The company duly received the whole of the compensation moneys due to it under the Regulations. The resale by the United Kingdom of part of the wool it had thus acquired resulted in large profits. These profits were distributed in accordance with an Act passed for the purpose in 1948. The Squatting Investment Company, Ltd., received its share of these profits in pursuance of the Act. The Commissioner of Taxation claimed that the amounts so received by the Company were liable to tax. The High Court of Australia negatived the claim of the Commissioner. On appeal the Privy Council held :

> " that having regard to the whole history of the matter, the sum received by the respondents pursuant to the provisions of the Act of 1948 must be regarded as an additional payment voluntarily made to them for wool supplied for appraisement, or, if the compulsory acquisition could properly be described as a sale, a voluntary addition made by the Commonwealth to the purchase price of the wool. It was in the respondents' hands a trade receipt of an income nature, and formed part of their assessable income under section 25 of the Income-tax Assessment Act, 1936-49, as ' gross income derived directly or indirectly from all sources whether in or out of Australia........which is not exempt income, and was accordingly liable to tax.'."

The other case is reported in *Severne (H. M. Inspector of Taxes)* v. *Dadswell*[2]. The facts are thus summarised in the first paragraph of the head note :

> " The respondent was granted a licence to mill flour in October, 1941 and carried on the trade of flour milling until September, 1945. As he had not been a miller at the outbreak of war, he was not entitled to the benefit of a remuneration agreement whereby millers were compensated by the Ministry of Food for losses incurred under war time arrangements for the purchase of wheat and sale of flour. Having, however, been informed by the Ministry in 1943 and twice later that the remuneration of millers who had begun milling during the period of control was under consideration he made a claim in 1949 on the same basis as that laid down in the remuneration agreement and received payments in settlement."

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1. L.R. (1954) A.C. 182.   2. 35 T.C. 649.

The assessee contended that the sums received in 1949 were not trading receipts but *ex gratia* payments. Alternatively he contended that they were received after the cessation of his trade and that if it was a debt arising at the date of the cessation its value at that date was nil. The Commissioners upheld the assessee's contention. On appeal the Court held:

> " If on the discontinuance of a trade a payment for work already done has not been finally settled, accounts can be reopened so as to bring in a payment for such work, even though it is gratuitous which is made thereafter."

We may at this stage also refer to the decision in *A.M.K.M.K.* v. *Periappan Chettiar*[1]. The material facts in that case were as follows : The appellants and the respondents were both of them money-lenders carrying on business in Penang. They had dealings with each other on current account as from February, 1939. They continued to operate on the account during the period the country was under Japanese oc upation. The account was closed on or about 6th August, 1945. The question arose as to in what order payments made by the debtor to the creditor should be applied. The Privy Council held that by reason of section 8 of the Ordinance a payment during the occupation period was to be deemed to have been applied first to any debit balance which arose during the occupation period. Each subsequent payment during the occupation period must be treated as having been applied first to any debit balance that arose during the occupation period and existed at the time of the payment, and subject thereto, must be treated as having been applied in reduction of the pre-occupation debt. Each payment applied in the latter manner was a valid discharge of such pre-occupation debt to the extent of the face value of such payment, subject, of course, to provisions for scaling down.

In seeking an answer to the questions that arise on these references it is as well to begin by examining the simplest possible case. Let us take the case of a money-lender who has got a capital of one lakh of rupees. He employs no borrowed money in his business. He lends the entire amount of one lakh of rupees at 10 per cent. per annum and all the loans he makes are repaid at the end of the year, which means, he would have received in all Rs. 1,10,000. But we compute his profits at Rs. 10,000; that is to say from the aggregate sum of Rs. 1,10,000 that our money-lender has received we deduct the principal amount he has advanced. In other words, we ignore the amount he has received from his debtor in repayment of the principal. Now, if we do not do that and treat the entire sum of Rs. 1,10,000 that has come into his hands as a revenue receipt and require him to pay tax on the whole of that sum, a very absurd situation would arise. But, in substance, this is exactly what the Income-tax Officer and the Tribunal have done in the cases which fall in the first category in our series. From this simple illustration it will be plain that when computing the profits of a money-lender, we must not take into account the moneys he has received back on account of the principal he originally lent.

Let us now complicate the position by supposing that out of the loans our money-lender has advanced a sum of Rs. 2,000 and interest thereon is found to be irrecoverable. In such a situation in order to ascertain his true profits, what we do is to deduct the irrecoverable amount of Rs. 2,000 from the interest recovered on the other loans which our money-lender has made. That is under this express statutory provision in section 10 (2) (*xi*) of this Act. The position would then be this. Interest earned by Rs. 98,000 at 10 per cent. is Rs. 9,800 deduct Rs. 2,000 which is irrecoverable and is lost. Profit Rs. 7,800. It will be appreciated that even in this case when computing profits, we do not take into account moneys received in repayment of the principal amount.

Now, let us suppose that our money-lender uses no capital of his own but trades with borrowed money ; that is to say, he has borrowed one lakh of rupees at 4 per cent. and has lent out the whole of it at 10 per cent. If, at the end of the year, he gets back all the moneys he has lent and also repays all the moneys he has borrowed, he would have made a profit of Rs. 10,000 less Rs. 4,000, that is to say, Rs. 6,000. Even at this stage, for computing the true profits of our money-lender, we do not take into account the moneys he has received in repayment of the principal. Nor, on the

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1. L.R. (1955) A.C. 230.

other hand, do we take into account the moneys he has repaid by way of principal. In actual practice, no doubt, all the moneys which our money-lender has lent out will not be repaid in the course of the same year and similarly he will not have repaid in the course of the same year all the moneys he has borrowed. So, let us go another step forward and suppose that in the course of the year our money-lender has received by way of repayment only Rs. 50,000 of the principal he has lent and interest thereon. He would then have received in all Rs. 55,000. Let us suppose that he has in his turn repaid Rs. 52,000 to the person from whom he borrowed money. This means that his profit for the year would be Rs. 5,000 less Rs. 2,000 that is to say, Rs. 3,000. Even now, we do not take into account the moneys received in repayment of principal and the moneys paid back in repayment of principal. If in this particular case, any debt has become irrecoverable, the amount of that debt will be deducted from the sum of Rs. 3,000 and the balance alone, if any, will be the actual profits. No doubt, when we prepare a statement of assets and liabilities, we certainly bring into the account the principal amounts involved in the transactions ; we would show on the one side the principal outstanding and similarly on the other side the principal repayable. But and it is important to bear this in mind amounts which come into a statement of assets and liabilities do not all of them enter into the reckoning when we have to ascertain the profits.

From all this, one simple conclusion emerges plainly. When we have to compute or ascertain the profits a money-lender has made, we do not take notice of the moneys he has received in repayment of principal, nor conversely do we take notice of the moneys he has repaid on account of principal. From this it follows that the sums which a money-lender has received in repayment of the principal cannot be subject to tax. Conversely, he cannot claim that the amounts he has repaid as principal should be differently treated and that the amounts so repaid should be deducted from his profits. The two items, that is, repayments of principal received by the money-lender and repayments of principal made by the money-lender must both of them be excluded. When a debt has become a bad debt, the amount of that debt is deducted from the profits, under the specific terms of section 10 (2) (*xi*) of this Act.

The reason given by the Income-tax Officer for treating the entire amount received by the assessee in pursuance of the Ordinance as income proceeds on a misconception of the legal and factual position. He overlooked the fact that the payments were made in a depreciated currency and that though the payments discharged the debts in accordance with the law at the time the payments were made, the result of the Ordinance was to revive the old debt. By missing these facts he was inclined to take the view that the subsequent payments were in the nature of accretions to profits which of course, they were not.

The Appellate Assistant Commissioner appreciated correctly the implications of the Ordinance but the mistake he made was in not distinguishing receipts on account of principal from receipts on account of interest. The Tribunal took the view that the moneys received in pursuance of the Ordinance must be considered to be in the nature of bad debt recoveries. It seems to us that this view is erroneous. A bad debt is a debt which has become irrecoverable owing to the financial position of the debtor or for other reasons, but debts repaid in occupation currency cannot be described as bad debts. The payments made validly discharged the debts. They were therefore not cases of irrecoverable debts, but of debts discharged in accordance with the law in force at the time.

As the analysis we attempted earlier will have shown, the view of the Department and the Tribunal that the assessee was not entitled to claim any deduction in respect of the payments it made to its creditors is erroneous. The Income-tax Officer appears to have assumed without enquiry that the repayments were only on account of capital. Paragraph 6 of the reference which the tribunal made to this Court (R.C. No. 43 of 1955) runs :

"The Income-tax Officer refused both the aforesaid deductions for identical reasons, *viz.*, that the assessee was under no legal obligation to make the aforesaid second payment and also that it represented anly repayments of capital and not an expense of the business."

The view that the assessee was under no legal obligation to pay is clearly unsustainable. The obligation to repay was created by a statutory enactment and could not be avoided.

The other mistake which the Department and the Tribunal fell into in dealing with this category of cases was that they overlooked the difference between payments made towards interest on the money borrowed and payments made in repayment of the principal borrowed. Interest on money borrowed is a necessary item of expenditure, as essential and as unavoidable as the rent for the premises occupied by the business or the rent paid for a godown or the hire paid for a lorry for the transport of goods. When we look at the matter from a business point of view it will be seen that interest is nothing more than hire-charges for money.

Certain other contentions were put forward during the arguments and to some of these reference must now be made. In several judgments it has been observed that

" a money-lender's stock-in-trade consists of the money which he has for the purpose of carrying on his business ".

In computing the profits or loss of a business all the moneys a trader receives by disposal of his goods or wares are brought to one side of the account and all the moneys he spends on acquiring the goods or wares are brought into the other side of the account. On this basis it was suggested on behalf of the assessees who had been required to make further payments in pursuance of the Ordinance that whatever sums a money-lender has to pay to his creditor must be treated as a permissible deduction. Now though several decisions speak of a money-lender's stock-in-trade as consisting of his money the expression is only descriptive and we must be careful not to push the analogy too far. A trader is concerned to sell his goods or wares and he does not expect or even want to see them back. A money-lender, on the other hand, does not *sell* his stock-in-trade, he only *lends* it. Or, to put in a different way, he only hires out his money, he not only expects but also wants to get back his wares: if he did not get them he would go bankrupt.

R.C. No. 59 of 1954 is a case in the second category, that is to say, a case where the assessee had to make further payments in pursuance of the Ordinance. Mr. Vasantha Pai, who appeared for the assessee, argued: During the period the country was occupied by the Japanese, Japanese currency was the only legal tender. Towards the middle of 1943, the Japanese withdrew the Malayan currency and in fact they made it an offence for any one to be in possession of the Malayan currency. The assessee could not therefore carry on his business except in Japanese currency. The assessee repaid in Japanese currency and so discharged his liability. The direction in the subsequent statute that part of the money should be paid over again could be obeyed only by taking it out of the stock-in-trade of the assessee and as the assessee has thus parted with his stock-in-trade, he is entitled to treat so much of that stock-in-trade as a loss. The argument is ingenious but untenable. First of all, it may be observed that no material has been placed before us on the basis of which we can say that Japanese currency was the only legal tender. It may be that the Japanese made trafficking in currency an offence. But we have not been shown anything to justify the view that during the period the country was occupied by the Japanese, mere possession of Malayan currency was an offence. Nor do we think it right to say that the direction in the Ordinance that further repayments should be made on account of old debts could be obeyed only by disposing of the stock-in-trade. In fact, this argument is illustrative of the danger of pressing the analogy between money and stock-in-trade too far.

It must next be remembered that for purposes of tax, the source from which an assessee has to pay is not very important. The argument of Mr. Vasantha Pai also overlooks the fact that the effect of the Ordinance was to revive the old debt.

It may be that at the time he paid the money, the assessee thought that he had discharged the debt. But the Legislature thought it fit to decree otherwise.

Mr. Pai next said that the effect of the statute was to impose an extra liability on the assessee and the payment of a statutory liability is a legal item of expense. The argument would have been good if the Ordinance had been a taxing statute. But it was not that.

Mr. Pai next said that we may treat the payments as losses occasioned by fluctuation in currency and in this connection he referred to the case in *Commissioner of Income-tax, Burma* v. *A.S.A. Concern*[1]. But we can see no points of similarity between that case and the ones before us.

On behalf of the assessee in R.C. No. 64 of 1955, Mr. Subbaraya Iyer put forward this argument. One Palaniappa Chettiar owed the assessee $ 40,500 being the principal of a pre-occupation debt. On 15th August, 1944, 16th August, 1944 and 17th August, 1944, Palaniappa Chettiar repaid $40,000 in Japanese Currency. As on 12th April, 1945, the account showed that $ 5 000 was still due. Palaniappa Chettiar died on 10th September, 1945. Lakshmanan Chettiar the executor of his will, and the assessee, entered into an agreement on 15th February, 1950, whereby the sum payable by the estate of Palaniappa Chettiar on account of principal and interest was fixed at $ 46,052. 48. Out of this, the interest was $ 5,686.88. The balance of the principal therefore should be $ 40,365. 60. (In the affidavit filed in this Court, however, the amount is shown as $ 40,500.) Some twenty days before this agreement, that is to say, on 25th January, 1950, Lakshmanan Chettiar, the executor, paid $ 5,000 which was adjusted against the principal as subsequently ascertained on 15th February, 1950. On 1st July, 1950, there was a partition between the two co-parceners of the family of the assessee and one-half of the debt was taken by each of the co-parceners. This agreed debt was not recovered in the year of account, but the income was returned for assessment on the Chetti system of accounts.

Mr. Subbaraya Iyer further stated that the amount due from Palaniappa Chettiar was not put forward as a loss in the claim made under the scheme and stressed that in consequence the moneys received on this account should not be treated as income.

In the affidavit filed in this Court it is stated that the loss actually claimed by the assessee for the four (sic) assessment years 1942-1943 to 1946-1947 exceeded the total of his profits for 1942-1943 (sic) and 1941-1942. By adding this particular item to his losses, the assessee therefore did not stand to gain anything. It may be, therefore, that he left it out for that reason. But whatever that may be, it does not follow that because the assessee did not include this amount as a loss in respect of the scheme period, the amount that since came into his hands is not an assessable item of receipt. So far as the agreement dated 15th February, 1950 is concerned, the arrangements then entered into would undoubtedly be valid in view of section 13 of the Ordinance. But as the allegations in that regard have been placed before us for the first time in the form of an affidavit we cannot naturally investigate them here. That will have to be done by the Tribunal.

We answer the questions raised by these references as follows :

A : Where an assessee has received repayments, he will not be liable to tax in respect of amounts he has received as or towards principal ; but he will be so liable in respect of moneys which he has received as or towards interest. Where only part of the debt has been recovered, the assessee will be at liberty, subject to the law relating to appropriation of payments, to appropriate the money he has received either towards principal or interest. The assessment in respect of such receipts will proceed on this basis ; that is to say, if the payment has been lawfully appropriated towards interest, the assessee will be liable to pay tax thereon. But if he has lawfully appropriated it towards principal, he will not be liable to pay tax on it. Statements have been filed before us in some cases showing how much has been received on account

1. 1937 I.T.R. 456.

of interest and how much on account of principal. It will be for the Tribunal to check the correctness of these statements and revise the assessments on the basis of the directions we have now given. In all these cases, the assessees will be entitled to their costs, Counsel's fee Rs. 250 in each case. The cases in this category are R.C. Nos. 33, 58, 59, 60, 64 and 65 of 1955 and R.C. Nos. 97, 98, 102, 112, 113 and 115 of 1956.

B : Where an assessee has made payments, he will be entitled to deduct from his income and claim exemption from tax for only such amounts as he has paid on account of interest. He will not be entitled to deduct any payments on account of principal. In this category of cases too, statements have been filed in certain cases. The Tribunal will have to check and verify them and revise the assessments in the light of our directions. In all these cases, the assessees will pay the costs of the Department. Counsel's fee Rs. 250 in each case. The cases in this category are : R.C. Nos. 59 of 1954, 42, 43, 75 and 82 of 1955 and R.C. No. 64 of 1957.

In all these cases, as a further investigation of the factual position is necessary, the Tribunal should give both the assessees and the Department a further opportunity of placing before the Tribunal such material as is available to them.

V.S. ——— *Reference answered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

The Management of 'The Hindu' (Madras .. *Petitioners**

v.

The Working Journalists of 'The Hindu', Madras and another .. *Respondents.*

Industrial Disputes Act (XIV of 1947), section 11—Jurisdiction of Court or Tribunal under—Labour Court or Industrial Tribunal—If has jurisdiction to proceed with an adjudication referred to it even after the dispute loses its character as an industrial dispute—Subsequent facts—Whether relevant.

It is now well settled that an individual dispute will not in itself be an industrial dispute within the meaning of the Industrial Disputes Act, unless it is supported by a majority of the workers. Though a dispute may be an industrial dispute on the date it was referred to the Labour Court for adjudication, it may lose its character as such at a later date. Where an individual dispute supported by a majority of the workers, was referred to the Labour Court for adjudication under section 10 of the Industrial Disputes Act, when the majority of the workers withdraw their support, the dispute would lose its character as an industrial dispute.

The jurisdiction conferred on a Labour Court or Tribunal is not a general jurisdiction like that of an ordinary civil Court but is a limited one given by the Statute that created it. An Industrial Tribunal or Labour Court would normally lose its jurisdiction under section 11 to proceed further in any matter referred to it when once the dispute goes out of the category of industrial disputes. Further, a Labour Court, like any other Court, must take notice of facts which have happened after the institution of the proceedings and a Court or tribunal cannot pass futile or unrealistic orders. Courts have to mould their remedies to the actual facts before them and they cannot refuse to take notice of facts which have happened during the pendency of the proceedings before them. This rule will equally apply whether the subsequent facts relate to jurisdiction of the tribunal or to other rights.

Petitions under Article 226 of the Constitution of India praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the preliminary award, dated 25th April, 1958, in I.D. No. 54 of 1957 on the file of the Labour Court, Madras, and published in the *Fort St. George Gazette*, dated 21st May, 1958 and quash the said order.

R. Ramamoorthy and *K. Soundararajan*, for Petitioners.

S. Mohan Kumaramangalam and *K. V. Sankaran*, for First Respondent.

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* W.P. Nos. 427 and 428 of 1958. 7th April, 1959. (17th Chaitra 1881—Saka.)

The Court made the following

ORDER.—From about the middle of 1950 R. Narasimhan was a Sub-editor of *The Hindu*. It was part of his duties to edit the reports of mofussil correspondents of the paper from the Tamil Nad area. On 23rd June, 1957 C. R. Sampath, the Salem Correspondent of *The Hindu*, sent a report which ran as follows :

"Krishnaswami Chetti, a member of the local Dravida Munnetra Kazhagam, was stabbed with a knife on June 21, at 1 A.M. near Salem Market Railway Station and received injuries on the hand and stomach. He was admitted into Government Headquarters Hospital and was later discharged. In his complaint to the police, the injured man stated that he was stabbed by one Anbanandam, belonging to Dravida Kazhagam, due to party feelings. Sub-Inspector S. Gopalakrishnan of Shevapet has registered a case under section 324, Indian Penal Code (voluntarily causing hurt by dangerous weapons) against Anbanandam. No arrest have (sic) been made so far".

News exclusive to *The Hindu* : Security proceedings under section 145, Criminal Procedure Code (sic) has been launched against the D.M.K. and D.K. members of the locality regarding Self-Respecters Association Buildings. The trial comes before R.D.O., Salem, on 24th June, 1957."

R. Narasimhan edited this report and published it in *The Hindu*, dated 24th June, 1957, in the following form :

" Mr. Krishnaswami Chetti, a member of the local Dravida Munnetra Kazhagam, died of stabbed (sic) injuries on June 21.

In a declaration to the Police, Mr. Krishnaswami Chetti had stated that he was stabbed in the stomach and hand near the Salem Market Railway Station by a Dravida Kazhagamite."

It will be noticed that during the process of editing, the story underwent a complete metamorphosis. A case of hurt grew into a case of murder. The Salem correspondent had merely stated that Krishnaswami Chetti had been stabbed with a knife, and, he had clearly mentioned in his report that Krishnaswami Chetti was later discharged from the Government Hospital into which he had been admitted. In the news, as Narasimhan edited it, it was made to appear that Krishnaswami Chetti had died of stab-injuries. When copies of the paper containing the news as edited by Narasimhan reached Salem the local correspondent of *The Hindu* appears to have been put to some annoyance and on 25th June, 1957, he wrote to the Editor taking exception to the news as published. The Chief News Editor called for the explanation of Narasimhan who admitted :

" I edited the Salem copy under the mistaken impression that the man had died of stab-injuries. I regret the error ".

The Chief News Editor could take no action against Narasimhan himself, so on 5th July, 1957, he placed the papers before the Chief Editor on his return from abroad. On 9th July, 1957, the Chief Editor called upon Narasimhan to show cause why he should not be removed from service. In that notice he set out the report which Sampath had sent from Salem and the news as edited by Narasimhan, and then, observed :

" You will realise that this is a very serious matter. In the state of tension that exists between the D.M.K. party and D.K. party in Salem and other places and having regard to the fact that security proceedings have been taken by the police against the D.M.K. party, and D.K. party as stated by the correspondent in that report the wrong information published in *The Hindu* might have easily led to a flare-up and our Salem correspondent might have been exposed to serious risk. Your editing of the report and its publication in *The Hindu* are also calculated to undermine the reputation of our newspaper for accuracy of news.

Having regard to the clear and unambiguous report of our Salem correspondent it is impossible to understand how any one could have mutilated that report and edited it in the way you have done. It shows a degree of irresponsibility or utter incompetence for the job on your part which the management cannot be expected to condone."

The Editor also pointed out :

" This is not the first time you have exhibited such irresponsibility in the discharge of your duties. You had committed a number of mistakes in the past in editing the reports. You will remember that in January, 1956, you were severely warned by the Managing Editor and you were definitely informed that drastic action would be taken against you if you were found to be careless in your work againl In July, 1956, you were warned by the Editor and told that repetition of such mistake would compe the Management to take severe action against you. All these warnings seem to have had no effect on you, as is shown by your editing of the report of the Salem incident ".

The notice went on to say that the Management was unable to accept Narasimhan's explanation that he was under a mistaken impression that the man had died.

On 11th July, 1957, Narasimhan submitted an explanation in the course of which he stated :

"I submit that the mistake was due to an impression I had wrongly got that the man had died of the injuries."

He also mentioned that he showed the edited copy

" to my senior colleague Sri P. K. Balasubramaniam, who approved it, also evidently under the same mistaken impression".

He further explained :

" It is a well-known fact that, despite the most perfectly devised machinery, mistakes of this kind occur in the best newspapers in the world. I do not seek to defend mistakes ; I am merely pointing out that the pressure in a newspaper office where we work to a deadline is such that it is in the very nature of things for mistakes to creep in. This can be verified from the records of any office, including ours. . . . . .

I wish to submit that the punishment you contemplate, namely, the termination of my services, bears no relation to the offence. Even this mistake, I may add, does not warrant the charge that you have chosen to make that I have been irresponsible or displayed incompetence in the discharge of my duties. All my colleagues, including those in a supervisory capacity, I am confident, will bear testimony to the fact that I am a very competent sub-editor and that I am among the very few sub-editors in *The Hindu* who have handled every kind of news-item " as ma } be seen from the news allocation register), and have not been found deficient in any o the departments. It is against this background that I firmly repudiate your allegation that my editing of the item was " calculated to undermine the reputation of our newspaper foı accuracy of news". It must be obvious that my personal reputation is as much involved and I submit it is wrong to suggest that any working journalist will deliberately place himself in such a position.

May I also submit in this connection that similar and sometimes even graver mistakes have occurred in *The Hindu* in the past and that no such drastic action was contemplated, let alone taken action against the employees responsible for them. The procedure adopted in all those cases was to draw the attention of the person concerned to the mistake and administer a warning. That is why I am compelled to express my surprise that in my case alone you have chosen to hold out a threat of removal from service, unless it be that this is part of the attempts you have been making for over a year now to force me to abandon my trade union activities. When the Madras Union of Journalists, of which I was the then Vice-President, and of which I am now the General Secretary, raised a dispute regarding proof-readers, you called me to your room and rudely rebuked me for having been a party to the decision to fight the case in Court. On another occasion when you came to know that I was responsible for the formation of the Hindu Office and National Press Employees' Union, you charged me with indulging in " subversive activities". All these facts cannot but compel me to draw the conclusion that the threatened drastic action is meant more as a punishment for my trade union activity rather than for the mistake committed. This feeling is further strengthened by the fact that on the same day as the notice was issued to me you have pulled up several other colleagues who are members of the Madras Union of Journalists for mistake of a kind that were not taken serious notice of in the past—all immediately after the conclusion of the Protest Week, sponsored by the Madras Union of Journalists."

It is clear that Narasimhan was trying to establish that the Management was trying to victimise him for his trade union activities.

On 12th July, 1957, the Editor passed an order which ran as follows :

"The Managing Editor considers that the explanation you have given in your reply of the 11th instant is unacceptable. Your reply deliberately ignores the fact that on previous occasions you were warned and you were definitely informed that drastic action would be taken against you in case you were again found to be careless in your work.

The Managing Editor repudiates the various irrelevant and false allegations contained in your reply. The statement in your reply that the Editor had been making attempts for over a year to force you to abandon your trade union activities, that your were called to his room and rudely rebuked for having been a party to fight the proof-readers' case in Court and that on aonther occasion you were charged by the Editor with indulging in ' subversive activities ' is false. The conclusion you have built on these false premises, namely, that you are being punished for your trade union activities rather than for the mistake committed is therefore untenable.

In the circumstances the Management have decided to terminate your services and your services are accordingly terminated with effect from 14th July, 1957. The Management is, however, prepared to permit you to resign your job with effect from 14th instant and if you accordingly submit your resignation before 5 P.M. on 13th instant your resignation will be accepted."

Narasimhan, however, did not avail himself of the option to resign which this letter gave him. The result of it was that his services stood terminated with effect from 14th July, 1957.

On 12th July, 1957, the day on which the Editor passed the order I have quoted above some fifteen Working Journalists of *The Hindu* prepared a petition in the course of which they stated :

> "We know that Mr. R. Narasimhan's mistake regarding a Salem item was unfortunate. But he is conscientious in the discharge of his duties and indeed it was his desire to edit copy as well as he could that made him rewrite the correspondent's copy. In doing so, he made a mistake, thus altering the sense of the report. This is a kind of mistake for which there is no excuse but which any of us is likely to commit. We pray that you kindly see your way to forgiving him this time".

The Labour Court, however, found :

> "The receipt of it is denied by the Management and there is no sufficient proof that it was actually handed over to the Editor."

On 13th July, 1957, the Working Journalists of *The Hindu* belonging to the Madras Union of Journalists resolved to go on strike with effect from the following day and to remain on strike till the order terminating the services of Narasimhan was suspended and the matter was considered afresh. Later the same day the Executive Committee of the Madras Union of Journalists passed a resolution giving full support to the decision taken by the Working Journalists of *The Hindu*. It called upon all the Working Journalists and all other newspaper employees in this State and elsewhere to rally behind the employees of *The Hindu* " in this hour of trial". No strike, however, materialised because, as I was told, conciliation proceedings were initiated. On 14th July, 1957, the Madras Union of Journalists wrote to the Management of *The Hindu* that for the reasons stated in that letter they were calling off the strike.

On 17th July, 1957, Government passed an order referring the following question for determination to the Labour Court, Madras :

> " Whether the termination of services of Sri R. Narasimhan, sub-editor, is justified and to what relief he is entitled."

The order of reference contained two mistakes. One consisted in overlooking the provisions of the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955. The other consisted in assuming that Narasimhan was a workman within the meaning of section 2 (*s*) of the Industrial Disputes Act. On 20th September, 1957, Government passed another order amending their earlier order rectifying these two mistakes.

On 11th November, 1957, Mr. Ramamurthi who appeared for *The Hindu* in the Labour Court raised the preliminary objection that after the amendment which Government had made on 20th September, 1957, the dispute, should be treated as a new dispute as new parties had been substituted as a result of the amendment. On that the Labour Court recorded the following order ;

> " Mr. Viswanathan has no objection to this course. So this is treated by consent as a new dispute under the amended reference. The parties have filed a joint consent memo. saying that all proceedings taken prior or the amendment shall be deemed to be proceedings in the new dispute. Mr. Ramamurthi wants to file an additional counter and he is directed to do so in a week and reply if any to be filed in a week thereafter. This dispute is posted for framing additional issues if any on 28th November, 1957."

On 18th November, 1957, the Management of of *The Hindu* filed a counter in the course of which they stated:

> "The dispute referred is one affecting an individual, *viz.*, Sri R. Narasimhan and not one affecting the employees of *The Hindu* as a whole or a considerable section of those employees. The employees of *The Hindu* as a whole or of the editorial department to which Sri R. Narasimhan belonged have not made common cause with Mr. Narasimhan and treated his dispute with the Management as their own. . . . . . .
>
> The mere fact that the Madras Union of Journalists has taken up the cause of Sri R. Narasimhan will not make the dispute one between the Working Journalists of *The Hindu* and the Management. The Madras Union of Journalists is not connected with any particular newspaper establishment Its membership is open to all journalists in the Madras State, The allegation in the Claims State-

ment that the majority of Working Journalists employed in *The Hindu* are members of the Madras Union of Journalists is not correct. The Madras Union of Journalists is, therefore, not competent to represent or speak on behalf of the Working Journalists of *The Hindu*".

On 25th November, 1957, the Union filed a reply in the course of which they stated :

"The dispute referred by the State Government for adjudication by this Hon'ble Court in an industrial dispute within the meaning of section 2 (*k*) of the Industrial Disputes Act, read with section 3 (1) of the Working Journalists Act. The Union submits that the dispute referred for adjudication is one taken up by the Madras Union of Journalists which has among its members Working Journalists from various different newspaper establishments, including *The Hindu*. . . . .

The Union submits that there is a dispute between the Working Journalists of *The Hindu* and the Management within the meaning of section 2 (*k*) of the Industrial Disputes Act, read with section 3 (1) of the Working Journalists Act. In any event, in view of the fact that at no previous stage was this questioned at all, and in view of the fact that the dispute was referred by the Government for adjudication as a dispute between the Working Journalists of *The Hindu* and the Management, the burden will now rest upon the Management to show that there is no dispute. . . . . .

"The Union further puts the Management to strict proof of its assertion that the Working Journlists of *The Hindu* had not collectively espoused the cause of Sri R. Narasimhan ".

On 28th November, 1957, G. Narasimhan, the Manager of *The Hindu*, swore to an affidavit in the course of which he stated that the editorial staff of *The Hindu* comprised 36 members, that besides, there were 22 reporters, and, that the number of proof-readers was 31. Out of these, 29 members of the editorial staff and 18 of the reporters had signed and sent a letter to *The Hindu*, a photostat copy of which was attached. Likewise, 23 out of the 31 proof-readers had sent a letter to the Editor of which Exhibit B was a photostat copy. In the affidavit it was also stated that on 13th November, 1957, Narasimhan had obtained the signatures of some of the members of the editorial staff and of the reporters and proof-readers to a certain document, and that some of the individuals who had signed that document had written to the Editor of *The Hindu* withdrawing their signatures and explaining that they had signed the document under a wrong impression. Photostat copies of those letters were also attached. The affidavit concluded ;

"The exhibits speak for themselves and afford very clear evidence that there is no dispute at all between the Working Journalists of *The Hindu* and the Management with reference to the termination of service of Mr. R. Narasimhan and that the vast majority of the Working Journalists of *The Hindu* do not make common cause with him or the Madras Union of Journalists and that they are of opinion that the allegation as to Mr. R. Narasimhan being victimised by the Editor is unfounded."

On 3rd December, 1957, the Labour Court framed this additional issue :

"Is there no industrial dispute between the Working Journalists of *The Hindu* on the one hand and the Management of *The Hindu* on the other in relation to the termination of the services of Sri R. Narasimhan as contended by the Management ?"

On 20th December, 1957, 25 persons employed in the Proof-Examiners Department of *The Hindu* swore to an affidavit, in the course of which they stated :

"The dispute between Sri R. Narasimhan and the Management of *The Hindu* regarding the termination of the service of the former is purely his affair. We have not made common cause with him in regard to that matter or adopted his dispute as our own. We do not either individually or collectively support Sri R. Narasimhan in that dispute or the stand taken by him and the Madras Union of Journalists in that regard ".

The same day 29 persons employed in the editorial staff of *The Hindu* also swore to an affidavit to the same effect. On 21st December, 1957, 4 reporters of *The Hindu* also swore to an affidavit in the same terms. On 26th December, 1957, the Labour Court insisted that the deponents of these affidavits should be called as witnesses. In pursuance of that order some 41 persons were examined and they adhered to their affidavits.

On 7th December, 1958, the Union filed a memo. in these terms :

"In view of the fact that, out of the seventy-six signatures to the affidavits, dated 20th December. 1957, the 23 witnesses so far examined have given detailed evidence regarding the circumstances in which the affidavits were signed, the Union dispenses with the production of the witnesses mentioned in Schedule A and requests that only the witnesses mentioned in Schedule B be produced by the respondent for examination. The Union accepts the affidavits and letters M-1 to M-9 in respect of the persons mentioned in Schedule A whose presence in Court has been dispensed with ".

Accordingly 18 out of the 20 persons mentioned in Schedule B attached to the memo. were examined. The resulting position has been summarised in this manner by the Labour Court :

> "Therefore it must be found that 75 out of 90 working journalists of this concern have given evidence saying that they are not now supporting this dispute. About 45 to 50 of them are persons who were parties either to the resolution or to Exhibit W-2 and their evidence must be treated as a withdrawal of their support even though some of them have deposed to the effect that they never supported the cause, that they were never aware of the resolution and that they were under misapprehension about the true facts when they signed the Exhibit W-2 or that their signatures were obtained in Exhibit W-2 under express promises that it should not be used in the Court."

Before the Labour Court a contention appears to have been put forward to the effect that the Management must have exercised undue influence and exerted undue pressure on its employees ; that is why they no longer supported the cause of Narasimhan. On this the Labour Court observed:

> "In view of my finding on the other main point put forward by him it is unnecessary to discuss this contention in detail. There is no sufficient and reliable evidence to come to a finding that the Editor exercised any undue influence or pressure or threatened those who attended the conference. No doubt M.W. 32 deposed that when he saw other people signing Exhibit M-6 he thought it better to sign it under the impression that he might lose his employment as he was liable to commit mistakes often. The Editor cannot be made responsible for the thoughts of this witness, as there is nothing to show that he was one of those who at least attended the Editor's Conference. On the evidence relating to the conference it is not possible for me to find that any undue influence or pressure was used on these Working Journalists. Evidently as soon as these persons came to know that the Editor was feeling sore about their supporting Sri Narasimhan's cause they immediately began to withdraw their support, probably feeling that it was better for them to throw their lot on the side of the Management rather than the union or Sri Narasimhan. It only demonstrates the lack of grit and trade union spirit, and their over-anxiety to please the emoloyer."

On the first sentence in this paragraph I would make only one comment. To the extent that it suggests that undue influence was exerted on the employees by the Management it is inconsistent with the observations made earlier in the same paragraph that

> "it is not possible for me to find that any undue influence or pressure was used on these Working Journalists".

In view of the fact that 75 out of 90 Working Journalists had made it plain that they no longer supported the cause of Narasimhan, Mr. Ramamurthi on behalf of the Management contended before the Labour Court that the dispute had ceased to be an industrial dispute and that therefore the Labour Court had no jurisdiction to proceed further in the matter.

Mr. Mohan Kumaramangalam on the other side argued that the additional issue framed on 3rd December, 1957, should be decided with reference to the facts at the time the Government made the reference and that subsequent facts should not be taken into account.

On these contentions the Labour Court reached this conclusion :

> "I am inclined to accept the contention of Sri Kumaramangalam that the crucial date for deciding about the existence of an industrial dispute is the date of reference as admitted by the Management in their counter. The fact that the suppoiters have withdrawn their support makes no difference and does not convert this dispute into an individual dispute. I am also of the view that once a proper industrial dispute is referred for adjudication the only course open to the Labour Court is to decide it unless the parties choose to settle it among themselves. I am therefore unable to uphold the contentions of the Management that it is is no longer necessary to adjudicate this dispute and that it had ceased to be an industrial dispute."

The question I have to decide is whether a Labour Court would have jurisdiction to proceed with the adjudication of an industrial dispute when the dispute loses its character as an industrial dispute and becomes an individual dispute. There are no decisions directly on this point. Reference was made to *P. S. Mills Ltd.* v. *P. S. Mills Mazdoor Union*,[1] but it has really no application here. So far as that case may be said to have any bearing on the problem before me, all that it decided was this.

1. (1957) S.C.J. 38 : 1956 S.C.R. 872 : A.I.R. 1957 S.C. 95.

"We think that on a true construction of section 3, the power of the State to make a reference under that section must be determined with reference not to the date on which it is made but to the date on which the right which is the subject-matter of the dispute arises, and that the machinery provided under the Act would be available for working out the rights which had accrued prior to the dissolution of the business."

But that is not the question I have to decide here.

Mr. Ramamurthi argued that a Labour Court has jurisdiction only over industrial disputes and that once it is established that a dispute is not an industrial dispute or that it has ceased to be an industrial dispute, the Labour Court would have no jurisdiction to proceed further in the matter.

Mr. Kumaramangalam, however, replied that the duties of a Labour Court and of an Industrial Tribunal are laid down in section 15 of the Industrial Disputes Act and that once a reference is made by Government under section 10 of the Act, the Court or Tribunal must go on to pass its award. He did not dispute that a Labour Court or Tribunal cannot refuse to take notice of subsequent events, but he contended that it cannot take notice of subsequent events which affect its jurisdiction. He argued that otherwise employers might try to win over employees to their side so as to make it appear that the dispute has ceased to be an industrial dispute, and, contrariwise, the employees in their turn might try to win back their colleagues who had gone over to the side of the Management, and, that such a see-saw battle might go on indefinitely.

When considering these arguments two circumstances must be borne in mind. One is that the jurisdiction of a Labour Court or Labour Tribunal is not a general jurisdiction like that of an ordinary civil Court: it is a limited jurisdiction, limited by the statute which has created it. The statute confers on it power to deal with disputes of a particular class, *viz.*, industrial disputes, and, once a dispute goes out of that category it would normally lose its jurisdiction to proceed further in the matter. In the present case, during the pendency of the proceedings before the Labour Court, the dispute which was referred to it lost its character as an industrial dispute and ceased to be such. The second consideration that must be borne in mind is that Courts cannot issue orders in a vacuum, that they must deal with the actual facts before them and that to refuse to take notice of facts subsequent to the date on which a Court takes cognizance of a matter would be to act very unrealistically. Let us take the familiar case of a suit for partition. The plaintiff or the defendant dies. The Court directs that his legal representative should be brought on record. The Court does not say that it will not take notice of the death of the plaintiff or of the defendant. During the pendency of the suit some part of the property may be destroyed. In passing its final order the Court will not refuse to take notice of that fact. Again, during the pendency of the suit legislation may have been enacted cutting down the amount of money that might otherwise have been available to the family whose properties are sought to be partitioned. The Court will not say that it will not take notice of the fact, but will proceed on the basis that the money due to the family was as it stood on the date the suit was instituted. Let us take another kind of proceeding. A petition is filed to appoint a guardian for a minor. During the pendency of the proceedings the minor attains majority. Surely, thereafter the Court will not appoint a guardian for the minor. An application may be made for appointing a manager of the estate of a person of unsound mind. During the pendency of the proceedings the person concerned may become sane. No Court will say that it will proceed on the basis of the facts as they stood on the date when the petition was taken on file and that it will appoint a manager for the person's estate. Yet again, an application may be made for the leave of the Court to marry a ward of Court to a particular person. At the time the petition is presented the person proposed may have appeared to be eminently suitable. But subsequent events may show that the proposal is one to which the Court should not give its sanction. The person to whom it was first proposed that the ward might be married may have in the meantime become bankrupt or he may have been convicted for some offence, or, for some other reason it might be discovered that he is a most undesirable person. Surely no Court would insist that the matter should be dealt with as on the date on which the

application was presented. Courts have to mould their remedies to actual facts, and, it seems to me, that a Labour Court, just like any other Court, must take notice of facts which have happened after the institution of the proceedings.

Mr. Mohan Kumaramangalam, however, contended that these considerations would not apply to facts which affect jurisdiction. As I said before, no authority appears to exist on this question and Mr. Kumaramangalam was not able to suggest on what principle a distinction should be drawn between facts affecting jurisdiction and other facts. I find it difficult to discover any. Let us take our criminal Courts. A Second Class Magistrate has jurisdiction to try an offence under section 324, Indian Penal Code, but he has no jurisdiction to try an offence under 326, Indian Penal Code. Let us take this case. A person complains to a Second Class Magistrate that he has been stabbed. The Magistrate takes the case on file and issues summons to the accused. But later it is found that the injuries are such that the complainant has to stay in hospital for more than 21 days. When that happened the offence would fall under section 236, Indian Penal Code and the Second Class Magistrate would have no jurisdiction to try the accused for that offence. Here we have a case where after the Magistrate assumes jurisdiction events have happened which deprive him of jurisdiction. Numerous similar instances can be cited from the criminal law. And, I see no reason why this principle should not be applied to Labour Courts also. Let us suppose that the question whether a particular workman who has been discharged should be reinstated is referred to a Labour Court. During the pendency of the proceedings the man dies. It does not seem to be very reasonable to insist that the Labour Court should go on and pass an award directing that he should be reinstated if in its view his original discharge was improper. (The question of any moneys payable to him or his estate would of course stand on a different footing). Section 15 of the Industrial Disputes Act does not require that futile orders should be passed.

As for the objection of Mr. Mohan Kumaramangalam that if Labour Courts are allowed to take notice of facts that may happen after Government make a reference both parties might be tempted to win over the workmen to their respective sides, I would remark that it is quite possible to pass orders appropriate to the situations that may arise. That would be only another aspect of a not uncommon problem that arises where factions exist and individuals change sides.

As I said before, Courts have to mould their remedies to the actual facts before them and they cannot refuse to take notice of facts which have happened during the pendency of the proceedings before them. I can see no justification in principle for making a distinction between facts relating to jurisdiction and facts relating to other rights.

Since it is clearly established in the present case that the dispute referred to the Labour Court lost its character as an industrial dispute and is no longer such, it seems to me that the Labour Court would have no jurisdiction to proceed further in the matter. The rule *nisi* is therefore made absolute in both cases. There will be no order as to costs.

R.M. —————— *Rule nisi made absolute.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Thangavel Padayachi .. *Appellant**

v.

Rathna Padayachi and others .. *Respondents.*

Hind Law—Partition—Reopening of—Principles.

A partition once effected is final and can be re-opened only in cases of fraud, or mistake or subsequent recovery of family property. A partition which is shown to be prejudicial to a minor co-parcener will be set aside so far as he is concerned.

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* S.A. No. 844 of 1956.

17th October, 1958.
(25 Asvina 1880—Saka.)

Appeal against the Decree of the District Court of Tiruchirapalli in Appeal Suit No. 246 of 1955, preferred against the Decree of the Court of the 1st Additional Subordinate Judge of Tiruchirapalli in Original Suit No. 275 of 1952.

G. R. Jagadisan, for Appellant.

S. Rangaswami Ayyangar, T. S. Narasimhan and *T. R. Ramachandran*, for Respondents.

The Court delivered by the following

JUDGMENT.—This Second Appeal and the Memorandum of Objections arise out of the decree and judgment of the learned District Judge of Tiruchirapalli in A.S. No. 246 of 1955, reversing the decree and judgment of the learned Subordinate Judge of Tiruchirapalli, in O.S. No. 275 of 1952.

The suit, out of which this Second Appeal arises, was filed by the plaintiff for partition and separate possession of his one-sixth share in the suit properties.

Defendants 1 to 3 were members of an undivided Hindu family. The plaintiff is the son of the first defendant. On 11th October, 1939, there was a partition between the first defendant on the one hand and defendants 2 and 3 on the other hand. In that partition the total extent of properties to be divided were acres 29-70 cents of wet land and acres 9-18 cents of dry land and two houses. The properties given to the first defendant under the partition deed were acres 4-61 cents of wet land, 0-66 cents of dry land and a tiled house worth Rs. 600. The pre-partition debts payable by this family were Rs. 5,000. In regard to the wet lands allotted to the first defendant, out of acres 4-61, acres 3-12 cents stood in the name of Pappammal, the widowed sister of these defendants. The sale deeds standing in the name of Pappammal for these properties are Exhibits A-1, dated 19th August, 1918, A-8, dated 8th September, 1919 and A-9, dated 15th November, 1935. There is no dispute that subsequent to this partition two things happened. The first defendant on the one hand and defendants 2 and 3 on the other hand continued to enjoy the properties as allotted to them under the partition. The father of the plaintiff the first defendant Ratna Padayachi, acquired after partition the following properties:

Exhibit.	*Date.*	*S. No.*	*Details.*	*Extent.* Ac.	Cs.
B-4	23-4-1940	174/3	Sale deed by Lakshmana Padayachi to the first defendant. ..	1	60
		179/1	" " ..	1	02
B-9	29-6-1942	9/4	Sale deed by Natesa Padayachi to the first defendant ..	0	62
		10/5	" " ..	0	49
B-10	26-3-1945	208/10	Sale deed by Thangavel Padayachi to the first defendant ..	0	67
B-11	4-5-1942	227/4	Sale deed by Gurusami Chettiar to the first defendant ..	1	02½
		227/5	" " ..	0	09
			Total ..	5	51½

The second defendant Arumugha Padayachi acquired after the partition of 1939 the following properties :—

Item No. in the plaint in O.S. No. 275 of 1952 A. Schedule.	*Survey No.*	*Extent.* Ac.	Cs.
27	174/3	1	60
28	179/1	1	02
29	164/4	0	25
30	164/6	0	12

Item No. in the plaint in O.S. 275 of 1952/A. Schedule.	Survey. No.	Extent Ac.-Cents.
31	184/3	0 66
32	164/5	0 42
33	188/3	0 08
34	155/6	0 33
46	3/1	0 24
47	3/2	1 27
48	3/5	1 01
49	3/6	0 09
50	3/7	0 58
51	7/1	1 01
52	7/2	0 46
61	.. Tiled house built by second defendant after partition, dated 11th October, 1939, at his expense.	..
	Total	9 14

We do not know the properties acquired by the third defendant. I have just now mentioned that acres 3-12 cents standing in the name of Pappammal were allotted to the first defendant. This Pappammal had a sister. The plaintiff has married the daughter of that sister, *viz.*, the deceased fifth defendant Rajammal. On her death apparently without issue, her husband, the plaintiff Thangavelu Padayachi, has become her heir.

In 1942, under Exhibit B-3, dated 14th November, 1942, defendants 2 and 3, who remained joint in the partition of 1939, got divided *inter se*. It is in these circumstances that the plaintiff has come forward with his suit for partition on the ground, among other extravagant claims which were all negatived and which are not pursued here, that excluding the properties of Pappammal allotted to his father and making provision for proportionate share in the joint family debts by deduction, the partition was grossly unfair in so far as the plaintiff's father (first defendant) was concerned and it is not binding on him (plaintiff's share) and that therefore that partition should be reopened and a fresh allotment made so far as plaintiff is concerned.

The contention of the second defendant, with whom the third defendant sailed up to the last moment, was that the partition of 1939 was not grossly unequal, justifying its reopening and secondly that the plaintiff is estopped from disputing the 1939 partition. The third defendant who was sailing with the second defendant practically up to the last moment, apparently finding a fair wind blowing in the way of the plaintiff, set up the pretension that the 1942 partition as between himself and the second defendant was grossly unfair and that it should also be reopened.

The learned Subordinate Judge gave the following decree :

"In the view I am taking of the partition deeds of the years 1939 and 1942, I am satisfied that these partition deeds have been brought about by fraud and undue influence of the second defendant and therefore, there is no question of awarding compensatory cost to the second defendant.

In the result, plaintiff will be entitled to an 1/6th share in the properties mentioned in Exhibit B-1 *minus* the properties belonging to fifth defendant which is covered by Exhibit B-34. The second and third defendants in addition to their 1/3rd share in such of the properties covered by Exhibit B-1 which belongs to the family jointly, will each be entitled to half of the properties covered by Exhibits B-8, B-13 to B-15. First defendant will get an equal extent like plaintiff. Plaintiff and first defendant will each pay the second defendant 1/6th share each of the mortgage amount due under Exhibit B-2. Cost of suit will come out of the estate and will be borne by the parties proportionate to their share........"

On appeal the learned District Judge came to the conclusion that the partition of 1939 was not by itself grossly unfair and that plaintiff is estopped by his subsequent conduct from asking for such reopening and that no case has also been made out for re-opening the partition of 1942 and dismissed the suit. Hence this appeal by the defeated plaintiff.

In this second appeal, I am of the same opinion as the learned Subordinate Judge in regard to the 1939 partition and that in regard to the second partition of 1942, I am of the same opinion as the learned District Judge. Here are my reasons.

I shall first deal with the 1942 partition. In that partition there can be no dispute that besides what was given to the first defendant, the rest of the properties were divided between defendants 2 and 3. Both of them, as I shall show later, have colluded to over-reach the first defendant and divided the loot. The third defendant had never challenged this partition of 1942 at any earlier stage. In fact he backed the second defendant practically to the last moment. It is only after he found that a fair wind was blowing in the way of the plaintiff, he has also started setting up his pretensions for which there is no warrant. The second and third defendants have been acting upon the 1942 partition and I have set out above the list of properties acquired by the second defendant. There can be no doubt in these circumstances that there are no grounds whatever to reopen the 1942 partition as between the second and the third defendants and which cannot be the subject-matter of this suit except to the extent that the second and the third defendants will have to make good the deficiency in the allotment to the first defendant in the 1939 partition. Therefore, the memorandum of cross-objections by the third defendant is dismissed.

The law relating to the reopening of a partition is really well settled and is set out in P. V. Kane's History of Dharmasastra, Volume III, page 634; Mayne's Hindu Law and Usage, Eleventh Edition, page 567; Mulla's Principles of Hindu Law, Eleventh Edition, page 444: N. R. Raghavachariar's Hindu Law, Third Edition, page 423 and S. V. Gupte's Hindu Law, Second Edition, page 285 (Article 64).

Manu (IX-47) emphatically states:

> "Once is a partition made, once is a maiden given in marriage, once does a man say 'I shall make a gift of this or that'; these three are done only once by the good".

This means that a partition once made is final and cannot ordinarily be reopened. But there are exception to this rule. One exception is that where some property of the joint family had been fraudulently concealed by one member and was discovered afterwards or where some property was left out from partition either through mistake or accident, such property should be divided according to their shares among the persons who made the first partition. In this case there is no reopening of the partition once made, but there is another partition. Manu IX-218; Yaj. II, 126 Kaut. III-5 and Kat. 885-86 lay down this. Kat. says:

> "If (joint) wealth was concealed, but is afterwards discovered, the sons should divide it equally with their brothers in the absence of the father, (*i.e.*, even after his death). Whatever is concealed from each other (by the co-sharers) or what was divided in an unjust manner and whatever was recovered (such as debts) after (partition) should be partitioned in equal shares".

This is the view of Bhrug. The Smritichandrika, XIV-7-8; Dayabhaga XIII 1-33-5; Viramitrodaya II, 1-14 page 326; contain similar injunctions.

To sum up, a partition once effected is final and can be reopened only in cases of fraud or mistake or subsequent recovery of family property. A partition which is shown to be prejudicial to the minor coparcener will be set aside so far as he is concerned.

But at the same time where at a partition intended to be final, some part of the property has been overlooked or fraudulently concealed, but is afterwards discovered, it will be subject of a like distribution among the persons who were parties to the original partition or their representatives. But the former distribution will not be opened up again: Manu, IX-218; Mit., I-IX, 1-3; Dayabhagha XIII-1-3-6 (what has already been divided is not to be divided again). Conversely, where through a mistake as to, or ignorance of, the title, property has been handed over to one member for his share, which turns out to belong to a stranger, or is to be charged for his benefit, the person who has received such property will be entitled to compensation out of the shares of the others. It is only where the whole

scheme of distribution is fraudulent, whether as regards a minor or otherwise, it will be set aside absolutely, unless the person injured has acquiesced in it after full knowledge that it was made in violation of his rights. (Brih., II-486 ; Manu, IX-47 ; Dayabhaga, XIII-5).

Bearing these principles in mind, if we examine the facts of this case, we find that the partition of 1939, so far as this plaintiff is concerned, is liable to be reopened. The share allotted to the first defendant and in which the plaintiff will get a half share consisted of acres 4-68 cents of wet lands, including acres 3-12 cents belonging to the fourth defendant, the house-site of 7 cents and dry lands of 66 cents. The share allotted to defendants 2 and 3 consisted of acres 26-13 cents of wet lands, which included 32 cents belonging to the fourth defendant, house-site of 11 cents, dry lands acres 6-91 cents and outstandings Rs. 465. On that date the family liabilities were, as found by the learned Subordinate Judge, the Exhibit B-2, dated 12th June, 1937, mortgage executed by defendants 1 to 3 and discharged on 19th, May, 1945 and promissory note debts evidenced by Exhibits B-39 to B-47 except B-42 all executed by the second defendant, in all amounting to Rs. 1,300. These liabilities have been estimated by the learned Subordinate Judge who has also found that one acre of wet land would be worth Rs. 750 and that two acres could legitimately be considered to repay the share of liability to be allotted to the first defendant. It has been finally found, and I entirely agree with the conclusion of the learned Subordinate Judge and which has not in any way been effectively repelled by the learned District Judge, that acres 3-12 cents belonging to Pappammal and allotted to the first defendant is not joint family property. It is unnecessary for me to canvass once again the sound and adequate reasons on which this conclusion was arrived at by the learned Subordinate Judge. In fact no attempt was made before me to show that the appreciation of the evidence by the learned Subordinate Judge is either inadequate or incorrect. The learned Subordinate Judge after examining in paragraph 10 of his judgment the question whether these properties formed part of the joint family properties or that the properties really belonged to Pappammal in whose name the saledeeds stood, writes in paragraph 11 of his judgment as follows :—

"The other overwhelming evidence on the side of the plaintiff definitely goes to show that the B Schedule properties were exclusive properties of the fourth defendant, and probably was in the management of the three brothers, and simply taking advantage of the fact that they were in management, they choose to divide the properties as if they belong to the joint family. It was also stated that the 4th defendant has no issues, and that might have impelled defendants 1 to 3 to think that after the death of the fourth defendant the property will go to them, and that accounts for treating her property also as belonging to the joint family, and available for partition. I, therefore, find that the properties which did not belong to the joint family have, as a matter of fact been treated as available to the joint family for division and such properties have been included in Exhibit B-1 in 1939".

Therefore, the net result of this analysis is that the plaintiff got for his half share out of the properties got by the first defendant in the joint family properties, 33 cents of dry land, 3½ cents of house-site and 74½ cents of wet land instead of getting acres 4-55 cents of wet land, 3 cents of house-site and acres 1-26 cents of dry land. Out of this, one acre of wet land will have to be deducted as for his share of the joint family liability. Thus, he will get acres 3-55 cents of wet land, 3 cents of house-sites and acre 1-26 cents of dry land.

In regard to houses, the first defendant has been given a tiled house worth Rs. 600 and the second defendant has built a tiled house at his own expense after the 1939 partition. Therefore, so far as houses are concerned, there is no inequality in the partition. The partition has got to be reopened, so far as the plaintiff is concerned, only as regards the lands. It cannot be reopened so far as the first defendant is concerned, because the first defendant has remained *ex parte* and what is more, though a coparcener cannot give up the share of his son, (father, son and son's son all get by birth a vested right to share in the joint family property), it was open to the first defendant to limit his share to a figure much lower than what he would be entitled to. This unequal partition could be rectified by making the second and third defendants to make good the deficiency due to the plaintiff, *viz.*, what he should

have got as his half-share in 1939 partition *minus* half of what he got in that partition as his share.

The second defendant seeks to non-suit the plaintiff on another ground, *viz.*, the execution of Exhibits B-5 and B-26 by him. Exhibit B-5 is a mortgage executed by the plaintiff and his father, the first defendant, in favour of Natesa Chettiar. It appears from the recital in Exhibit B-5 that on that date the first defendant has purchased some of the properties covered by the mortgage. Under Exhibit B-5 the father and son hypothecate not only the properties purchased by the father on that date, but also the properties which fell to the first defendant's share in the parition under Exhibit B-1. The partition of 1939 is thus said to have been confirmed by the plaintiff. Exhibit B-26 is a registration copy of a bogyam-deed executed by the first defendant and the plaintiff in favour of Kumaraswami Chetty for Rs. 1,000. There also it is recited that the properties covered thereby have been got under a partition. It is therefore urged that the partition deed of 1939 has been given effect to and accepted and acted upon by the first defendant and the plaintiff and that the plaintiff is estopped from putting forward the present claim. That this would not operate as estoppel is the finding of both the Courts below. The learned Subordinate Judge has rightly pointed out that if the rule of estoppel is to operate, some detriment must have been to the second defendant by such a declaration on the part of the plaintiff. How the second defendant has been placed at a disadvantage by such a representation being made by the plaintiff to the third parties, has not been explained and from the mere circumstance that the plaintiff has joined in the execution of Exhibits B-5 and B-26 it could not be said that the plaintiff has given up his right to the joint family properties. Therefore, the point taken regarding estoppel fails and there is no legal bar to the present claim of the plaintiff.

In the result, the decree and judgment of the learned District Judge so far as the plaintiff is concerned, are set aside and the decree and judgment of the learned Subordinate Judge are modified as follows : The second and the third defendants in moieties will make good to the plaintiff acres 2-80½ cents of wet land, and 93 cents of dry land from out of the totality of their share of wet and dry lands. The decree and judgment of the learned Subordinate Judge in regard to the direction for the ascertainment of mesne profits of the plaintiff's share from date of suit is affirmed. A preliminary partition decree on the term will issue. Final decree to be passed by the learned Subordinate Judge.

As regards costs, taking into consideration the prior circumstances leading up to this litigation and the fact that the plaintiff and defendants have failed and succeeded in part, the parties will bear their own costs throughout. Costs, if collected, will not be refunded. No leave.

V.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Ramamoorthy and another .. *Petitioners**

v.

The Commissioner, Tirupattur Municipality .. *Respondent.*

Madras District Municipalities Act (V of 1920), section 3 (ii)—Hut—Temporary awnings over bunks—If a hut.

Temporary flat pandals usually put up over bunk-shops will not come within the definition of hut as defined in section 3(ii) of the District Municipalities Act as they are not buildings constructed principally of wood, mud, leaves or grass or thatch.

Per *curiam.*—It may be open to a municipality to notify such structures as hut.

Petitions under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Court of the District Magistrate (Judicial) of North Arcot at Vellore in C.A. Nos. 256 and 260 of 1958

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* Crl. R. C. No. 777 of 1958. 13th March, 1959.
(Cr. R. P. No. 743 of 1958.)

respectively (C.C. No. 620 and 618 of 1958, in the Court of the Sub-Magistrate, Tirupattur).

K. V. Sankaran, for Petitioner;

V. V. Radhakrishnan for The Public Prosecutor (*P. S. Kailasam*), for the State.

The Court made the following

ORDER.—These revision petitions raise an interesting point.

Within the limits of Tirupattur Municipality, there is a big banyan tree and under its spreading branches, a number of bunks are said to have been put up. These petitioners are carrying on their business there as bangle merchants. The land itself belongs to the local Devasthanam and rents are paid apparently to the Devasthanam also. In as much as these bunks are inside the municipal limits, they have got to take licences from the Municipality and such licences have been granted. But what has happened is, that on account of crows sitting on the branches of the banyan tree and their droppings fouling beneath, these merchants have put up flat pandals or awnings over their bunks. But they have been prosecuted by the Municipality, because they have taken out licences only for bunks and they have now put up unauthorised constructions beyond the terms of the licence.

Both the Courts below convicted the petitioners for putting up unauthorised construction, to wit, a *kottai* or thatched covering over the bunk, amounting to a hut as defined under section 3 (ii) of the District Municipalities Act.

Mr. K. V. Sankaran, learned counsel for the petitioners, has successfully persuaded me that this unauthorised construction would not amount to a 'hut' within the meaning of section 3 (ii), because, as it stands, it is not a building which is constructed principally of wood, mud, leaves, grass or thatch and there is no declaration by the Municipality for the purposes of this Act that a structure of this description comes within any temporary structure of whatever size or any small building of whatever material made which the Council may declare to be a hut for the purposes of this Act. Therefore, the convictions cannot stand, and they are hereby set aside, and the fines, if collected, will be refunded.

It will be open to the Municipality to make the declaration that a thatched roofing of this description would be considered to be a hut within the limits of the Tirupattur Municipality, and it may, after making that declaration, issue notice and evict these petitioners and if they disobey, prosecute them also.

Learned counsel brings to my attention that, if the objection is that this thatched covering is of inflammable material, the petitioners are prepared to put up coverings of zinc sheet or other non-inflammable material approved by the Municipality over their bunks. I am sure that this is a matter which will engage the attention of the Municipality before taking any steps to make the aforesaid declaration and evict the petitioners or prosecute them.

R.M. *Revision allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AIYAR.

Management of Cambodia Mills, Coimbatore .. *Petitioner**

v.

The Industrial Tribunal High Court, Madras and another .. *Respondents.*

Industrial Disputes Act (XIV of 1947)—Jurisdiction of Tribunal under, in matters relating to discipline.

The responsibility for the conduct of a business and for maintaining discipline therein rests squarely on the management concerned and one management may be slack and indulgent while another may be strict. An Industrial Tribunal is not a Court of Appeal in disciplinary matters and except in certain cases it cannot interfere in such matters.

Patna Electric Supply Co. v. *Bali Rai and another*, (1958) M.L.J. (Crl.) 385 : (1958) S.C.J. 416, referred.

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* W.P. No. 968 of 1958. 3rd March, 1959.
(12th Phalguna, 1880—Saka).

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the order in Petition No. 84 of 1958 in I.D. No. 44 of 1958 on the file of the Industrial Tribunal, Madras and quash the order, dated 18th November, 1958 and made therein.

V. Tyagarajan for *M. R. Narayanaswami*, for the Petitioner.

B. Lakshminarayana Reddi, for the second Respondent.

The Court made the following

ORDER.—The Management of the Cambodia Mills Ltd., Coimbatore, is the petitioner. In October, 1958, the second respondent, Karunakaran, was working as an electrical supervsior in the Mills. His immediate superior was the electrical engineer, Gopalan, by name. On 26th October, 1958, the Electrical Engineer reported in writing to the Manager that at 9 A.M. that day he had asked Karunakaran to work on the second shift from the 27th in the place of one Ponnappan who had resigned and that

> " he angrily and defiantly retorted that he will see the mannager and let the Manager say to that effect, that then only he will attend for the night-shift ".

The Electrical Engineer further reported :

> " I told him that I wanted him to come for the night-shift, that there was no use of his arguing the matter with me and that if he had any grievance he is at liberty to report and complain to the manager ".

But Karunakaran was in no mood to heed to his orders and went away saying that he would first see the Manager.

On the basis of that report the Management framed the following charge against Karunakaran on the 27th :

> "It is reported that yesterday when the Engineer who is your immediate superior asked you to come to work for the night from Monday, you told him you will ask the Manager and then only proceed. This is sheer impertinence because you have to obey your superiors. Among the staff we cannot tolerate any such impertinence and you are required to show cause within 24 hours of this why action including dismissal should not be taken against you for your serious misconduct failing which it will be presumed you have no explanation to offer and further steps will be taken against you".

The same day Karunakaran submitted an explanation in these terms :

> " When the Engineer asked me to come to work for the night from Monday, the 27th instant, I did not refuse to comply with his instructions. I only added that I would also ask the Manager about the sudden change, for I have been working always in the day for all these about eight years. This cannot be construed as sheer impertinence on my part. I have not done anything meriting immediate suspension. I, therefore, request you to kindly cancel the suspension order and allow me to report for duty, to-day itself".

The same day the Management again wrote to Karunakaran telling him that it was not satisfied with his explanation and that an enquiry would be held into his conduct on the 28th by the Manager of the Office. On the 28th the Manager held an enquiry in the course of which Gopalan, the Electrical Engineer and Krishnaswami, Electrician No. 1, were examined. Karunakaran was allowed to cross-examine both these persons. On 29th October, 1958, the Manager notified Karunakaran as follows :—

> " As a result of the enquiry held by me against you on charges of impertinence, etc., to your superior officer, the Engineer, I have dismissed you from service from 29th October, 1958 ".

The letter then said that he could take his " earned wages " and that he would be paid one month's wages under proviso to section 33 (2) of the Industrial Disputes Act of 1947, and that the payment was being made by way of abundant caution. The letter ended with the statement that the Managing Agency had gone fully into the papers and approved the action taken by the Manager.

At this time an industrial dispute between the Management and the workers was pending before the Industrial Tribunal, Madras. So the Management filed an application under section 33 (2) of the Industrial Disputes Act before the Indus

trial Tribunal asking for its approval for the action it had taken. By an order made on 18th November, 1958, the Tribunal refused its approval and dismissed the petition filed by the Management. The Management has, therefore, come to this Court for the issue of an appropriate writ to quash the order of the Tribunal.

Mr. Tyagarajan, the learned advocate for the petitioner, pointed out that in matters of this kind the Industrial Tribunal is not a Court of Disciplinary Appeal from the Management, that it has jurisdiction to interfere only where the Management has been guilty either of unfair labour practice or of victimisation or where the order it has made is clearly vitiated by *mala fides*, and that in the present case the Tribunal was in error in attempting to review the findings of fact reached by the Management. The comment was also made that there are some obvious errors in the order of the Tribunal itself.

It seems to me to be clear that in places the order of the Tribunal is mutually contradictory. In paragraph 2 of its order the Tribunal stated :

> "The Engineer as well as the witnesses examined, no doubt, gave evidence as stated above. Of course, that evidence has to be accepted, and the Manager who held the enquiry was right in accepting that evidence".

If that finding of the Tribunal stands the conclusion must follow that the charge against Karunakaran stood proved. But then almost immediately afterwards the Tribunal observed:

> "I find it difficult to interpret that statement of the worker as disobedience of the orders of the Engineer".

I do not find it easy to reconcile this observation of the Tribunal with the earlier and explicit finding it had recorded that the Manager who held the enquiry was right in accepting the evidence of it. The Tribunal then went on :

> "The worker must have thought that the Engineer was issuing improper orders in posting him to the night-shift, when for many years he was in the day-shift and therefore told the Engineer that he would speak to the Manager and then attend to the work............"

With respect, this seems to me to be mere surmise. Besides, I do not see how this surmise can be reconciled with the earlier categoric finding recorded by the Tribunal. The Tribunal went on to say :

> "The worker did not say that he would not obey the Engineer's orders, but said that he would attend to night duty as ordered, after making an appeal to the Manager".

Now, I can find very little support for this statement in the evidence. On the other hand the evidence is definitely the other way about. I quote the relevant passages from the evidence of Gopalan, the Engineer :

> "I told him to go for second shift on 27th on the morning of 26th Sunday. He then said...... he cannot attend to the second shift unless the Manager calls me and tells me so. Question by Karunakaran : 'Did you tell me that the Manager has approved of this change ?' Answer : "Yes, I told you'. Question by Karunakaran : 'Did I refuse to go for the third shift' : Answer : 'Yes. You said I will speak to the Manager and then only attend the night shift'
>
> Subsequently the Manager asked Karunakaran : 'Have you got any further statement to make'? Karunakaran replied 'Yes. When I came inside the Mills at about 8-30 A.M. on 26th Sunday, near the veranda of the time office, Engineer Mr. Gopalan standing near the veranda told me to come for night on the 27th. I asked him whether it was Manager's order. He replied, it was his order. I told him I will ask the Manager about this. After 15 minutes I told him I will go away and come for night and shall ask Manager later. I gave charge after telling him how the tools have been entrusted. There was no one in the Time Office when I was told to go for night-shift. Then I went away home' ".

Even from this statement of Karunakaran it is clear that at the time when Gopalan told Karunakaran to attend the night duty on the 27th he informed him that it was the Manager's order. Krishnaswami, the other witness, stated in unmistakable terms :

> "Mr. Karunakaran replied that he will not come for third-shift and will speak to the Manager. Then he went away saying he will speak to the Manager. Karunakaran asked him 'Did I tell him that I won't come or did I say I will speak to the Manager' ? Krishnaswami replied: 'You

said, I will not come for night-shift. I will speak to the Manager. The Engineer twice told you that the Manager has asked you to come for night shift ".

In view of these statements of the witness it is difficult to see how the Tribunal could have taken the view that Karunakaran did not say that he would not obey the Engineer's order but only said that he would attend to night duty after making an appeal to the Manager. This is an obvious error in the order of the Tribunal.

Mr. Lakshminarayana Reddi, the learned counsel for the second respondent, pointed out that according to the evidence of Krishnaswami, Karunakaran handed over a key to Gopalan the Engineer, and he explained that Karunakaran did so in order that he might be in a position to attend the night-shift. But, this explanation does not emerge from the evidence. Nor did Karunakaran say so in clear terms as he would have done if the explanation were true.

Mr. Lakshminarayana Reddi, the learned advocate for the second respondent, drew my attention to the explanation which Karunakaran furnished on the 27th in which he said :

" I, therefore, requested him to kindly cancel the suspension order and allow me to report to duty to-day itself".

He argued that this sentence made it plain that Karunakaran was willing to go on night duty on the 27th. I do not think that the words, are so plain at all. If Karunakaran was willing to go on night duty on the 27th, he could very simply and explicitly have said so in the explanation he furnished. As I read it, all that Karunakaran wanted was that the order of suspension should be cancelled. He did not say, as he had an opportunity then of saying, that he would report to duty on the 27th.

Mr. Lakshminarayana Reddi then said that the charge framed against the second respondent was only for impertinence, that the finding was one of disobedience and that the enquiry is vitiated in the sense that the finding and the charge do not tally. Now the first thing we must remember in matters of that kind is that the charges are framed by persons who are not conversant with the Criminal Procedure Code, and that it will not be right to scrutinise the charges in the same way as this Court would when it hears appeals from convictions and sentences passed by a Magistrate or a Sessions Judge. The charge as framed definitely stated that Karunakaran told Gopalan that he would ask the Manager and then only proceed. This, the charge-sheet stated, was sheer impertinence. Therefore, it would not be correct to say that there is a contradiction or variation between the charge and the finding. The impertinence referred to in the charge arose out of and is a commentary on the allegation of disobedience to the order of the Engineer.

Mr. Lakshminarayana Reddi, next said, and here he had the support of certain observations made by the Tribunal, that no question of disobedience would arise until the afternoon or the evening of the 27th when the time arrived for Karunakaran to report to duty and he failed to do so. I am unable to take this view of the matter. One illustration will make my meaning clear. If an engine-driver on the railway were told by his superior officer to be ready to take out a train at 5 P.M. on a certain date from Central Station and he were to reply that he would not do so, then nobody would, except the concerned authorities to wait till 5 P.M. on that day to make certain whether that particular driver would turn up for duty or not. On the other hand, if he makes it plain that he would not come the driver cannot claim that everybody concerned must have waited till 5 P.M. on the particular day to find out whether he would obey orders or not.

One must remember certain facts. The responsibility for the conduct of an enterprise rests squarely on the Management. The responsibility for maintaining discipline is also on the management. One Management may be slack and indulgent. Another may be strict. The Industrial Tribunal is not a Court of appeal in disciplinary matters. It cannot interfere except in the cases referred to by the

Supreme Court in *Patna Electric Supply Co.* v. *Bali Rai and another*[1] and *Martin Burn Ltd.* v. *R. N. Banerjee*[2].

The order complained of is liable to be set aside not merely for the reason that it runs counter to the decisions just referred to but also because of the contradiction and the mistake I have pointed out in the earlier portions of this order. In the result the writ prayed for will issue and the order complained of will be quashed. There will be no order as to costs.

R.M. ——— *Order quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Sinnathambi .. *Petitioner.**

Madras Prohibition Act (X of 1937), section 4 (1) (a)—Conviction for offence under—Sentence—Duty of Court to award deterrent and severe sentence.

A sentence of two months' rigorous imprisonment and a fine of Rs. 50 cannot be considered excessive in the case of a conviction under section 4 (1) (*a*) of the Madras Prohibition Act, for having been found in possession for sale to others of six bottles of arrack at about 8 P.M. in a public road. Having regard to the deep-rooted evils of drink and the length of time in which prohibition has come to be the statute of the State, Courts which have to enforce the Act systematically and fearlessly and even severely cannot treat with leniency the sale of illicit liquor as contradistinguished from the consumption of liquor by addicts.

Origin and growth of the drink evil and the prohibition policy discussed and traced.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the District Magistrate (Judicial) Coimbatore, dated 9th December, 1958, in C.A. No. 566 of 1958 (C.C. No. 1792 of 1958 in Sub-Magistrate's Court, Pollachi).

R. Desikachari and *V. Meenakshisundaram*, for Petitioner.

The Court made the following

ORDER.—This is a Revision filed against the conviction and sentence by the learned Sub-Magistrate of Pollachi in C.C. No. 9172 of 1958, which were confirmed by the learned District Magistrate of Coimbatore in C.A. No. 556 of 1958. The Revision Petitioner was sentenced under section 4 (1) (*a*) of the Madras Prohibition Act and sentenced to rigorous imprisonment for two months and to pay a fine of Rs. 50, in that he was arrested with M.O. 1 tin, which contained six bottles of arrack at about 8 P.M. on 19th October, 1958, in the cross-cut road in Valparai limits. The correctness of this conviction was not canvassed before the lower appellate Court but only the sentence was attacked as excessive. The learned District Magistrate refused to interfere with the sentence on the ground that the possession of a considerable quantity of arrack could only have been for sale to others. Therefore, he dismissed the appeal. Hence this Revision in which the severity of the sentence is pressed.

The enforcement of prohibition poses before us two difficult problems, *viz.*, the magnitude of the evils of drink and secondly how being a deep-rooted evil, it requires systematic, fearless and severe application. The following historical account gathered from the Encyclopaedia Britannica will form a fitting introduction in the following account of this ancient problem in the earlier stages of our history.

Ever since man in some distant age first discovered that process of fermentation by which sugar is converted into alcohol and carbonic acid, and experienced the intoxicating effects of the liquor so produced, there has been, in a sense, a prohibition question. The records of the ancient oriental civilization contain many references to it, and from very remote times efforts were made by priests, sages or law-givers

1. 1958 S.C.J. 416 : 1958 M.L.J. (Crl.) 385 : A.I.R. 1958 S.C. 79.
2. 1958 S.C.J. 255 : 1958 M.L.J. (Crl.) 208 :

* Crl. R.C. No. 1076 of 1958. 19th December, 1958.
(Cr. R. P. No. 1031 of 1958.) (28th Agrahayana 1880—Saka).

in India, Persia, China, Palestine, Egypt, Greece and Carthage to combat the vice of drunkenness. But the evil appears never to have been so great or the object of so much attention in the ancient world as in western countries and our own era. Two circumstances mainly differentiate the modern problem ; one is the use of distilled waters or spirits as a beverage, and the other, the climatic conditions prevailing in the more northern latitudes which are the home of western civilization. The intoxicating drinks used by the ancients were wines obtained from grapes or other fruits, and beers from varous kinds of grain. These products were not confined to the East, but were known to the ancient civilizations of Mexico and Peru and even to primitive people who used the sugar containing juices and other subtances indigenous in their country. In the time of the Romans the barbarians in the north of Europe used fermented liquors made from honey (mead) ; Barley (beer) and apples (cider) in place of grape-wine. All such drinks produce intoxication if taken in sufficient quantity ; but their action is much slower and less violent than that of distilled spirits.

Distillation of essences from various substances seems to have been known to the ancients and to have been carried on by the Arabians in the dark ages ; but potable spirits were not known until the 13th century. The distilled essence of wine or *aqua vitae* (brandy) is mentioned then as a new discovery of Arnoldus de Villa Nova, a Chemist and Physician, who regarded it, from the chemical or medical point of view, as a divine product. It probably came into use very gradually, but once the art of distillation had been mastered it was extended to other alcoholic substances in countries where vine was not grown. Malt, from which beer had been made from time immemorial, was naturally used for the purpose, and then gin or Geneva spirits and whisky or usquebagh (Irish for "water of life") were added to grape brandy ; then came corn brandy in the north and east of Europe, rum from sugarcanes in the Indies, potato spirit, and eventually, as the process was perfected, rectified ethyl alcohol from almost anything containing sugar or starch.

The concentrated form of alcohol, thus evolved, for a long time carried with it the prestige of a divine essence given to it in the middle ages when chemistry was allied to all sorts of superstitions. It had potent properties and was held to possess great virtue. This view is embodied in the name "water of life" and was at one time universally held ; traces of it still linger among the very ignorant. Ardent spirit seemed particularly desirable to the habitants of the cold and damp regions of northern Europe, where the people took to it with avidity and imbibed it without restraint when it became cheap and accessible. That happened in England in the early part of the 18th century ; and, out of the frightful results which followed, there eventually arose the modern temperance movement. The legislature had been busy with the liquor traffic for more than two centuries previously but its task had been the repression of disorder ; the thing was a nuisance and had to be checked in the interests of public order. It is significant that though drunkenness had been prevalent from the earliest times, the disorder which forced legislative control did not make its appearance until after the introduction of spirits.

The history of our own country illustrates the self-same historical lessons.

In Vedic India, the principal drinks of the Aryans were Soma and Sura. The Soma plant has not been identified. It seems to have been growing in the mountains and the plant was prepared for use by being pounded with stones or in a mortar. The women squeezed the juice out with their fingers. The juice was afterwards mixed with water and strained through a sieve and then mixed with milk or curd and sometimes with honey and offered to the Gods, and drunk by the worshippers. It seems to have had a mildly intoxicating effect like beer. There was another kind of liquor which was also widely drunk, *viz.*, Sura. It has been generally condemned in the Rigveda, as under its influence, men committed sins and crimes (R.V. vii, 86, 6) and became devoid of sense and drunken (R.V. viii, 2, 12, 21, 14). It has been classed with dicing as an evil (R.V. vii, 86, 6). It was the drink of men in the Sabha, and gave rise to broils (Vedic India, ii. 458). How was it prepared cannot be ascertained. It may have been a strong spirit prepared from fermented grains and plants, as Eggeling

holds or, as Whiteney thought, a kind of beer or ale. Geldner renders it " brandy " (Vedic India, ii. 458-59). It was usually kept in skin-vessels (drti, R.V. i. 191, 10). According to the Taittriya Brahmana " it was, as opposed to Soma, essentially a drink of ordinary life" (Ved. Ind. ii. 458). (A. C. Das: Vedic Culture, pp. 209-210).

In Epic period and subsequently, liquor seems to have become an article of general consumption. Wine is referred to as an article of general consumption in all early literature.

" Let wine drinkers drink wine, let the hungry eat payasa and those who are inclined to it eat clean meat".

The Brahmins were later on prohibited its use. Palm-wine must have been in use very early ; mostly the liquors were obtained by distillation. The Ramayana refers to a beverage of this sort procured from fruits and the sugarcane. Manu refers to three varieties of wine according as the liquors were distilled from molasses (gaudi), bruised rice (paishti), and the flowers of the Mahua tree (Madhvi). The two former may be equivalent to the arrack and the rum of our times. Regulation of the liquor traffic was a special concern of the State. It was placed under a superintendent. The sale of liquor is to be centralised or decentralised in accordance with the requirements of demand and supply. Liquors were not allowed to be taken out of villages ; and the liquor shops were arranged at some distance from each other. Bad liquor was given sometimes to slaves or workmen in lieu of wages. Liquor could be sold to persons of well-known character in very small quantity,

" lest workmen spoil the work in hand, and Aryas violate their decency and virtuous character and lest firebrands commit indiscreet acts".

On special occasions people were allowed to manufcature white liquor, arishta for use in diseases, and other kinds of liquor. On the occasion of the festivals, fairs, and pilgrimage, right of manufacture of liquor was allowed for four days. Normally those who dealt with liquor other than that of the kind had to pay five per cent. as toll. The Arthashastra refers to Medaka, Prasanna, Asava, Aristha, Maireya, and Madhu as varieties of liquor. (Buch : Economic Life in Ancient India, Volume II, p. 181).

There was regulation of the drink traffic. Among other affairs of civic life Kautilya provides for the regulation of the drink traffic and gambling. Brahmins were placed under severe penalties for indulging in liquor. Neither taverns nor gambling-halls were allowed in villages, and those in towns were limited in number and under strict supervision. The former had to be decently furnished and provided with scents, flowers, water and other comfortable things, according to the season, so that the lure of the drink should not be the only attraction. Inspectors or spies stationed in the taverns took note of the *habitues* and ascertained whether they drank moderately or excessively. They also noted the value of the jewellery and other valuables in possession of customers who were intoxicated, for, in the event of robbery the tavern-keeper had not only to make good the loss, but was liable to a fine of the same amount.

The superintendent of liquor was to carry on the traffic in liquor and ferments in the capital, the other parts of the country and in army camps by employing men familiar with them, he was to impose a fine of 600 panas if anyone other than the manufacturers, licensed vendors and vendees sold or purchased liquor, he was not to allow liquor-shops to be opened close to each other, he was to see that liquor was sold in small quantities such as ¼ or ½ of a *kudumba* or a half prastha to persons of known character in order that (lit. for fear) workmen employed should not cause loss through carelessness, that *aryas* might not violate the rules of good conduct and that desperadoes should not commit indiscreet acts. Sukra was even more strict as regards wine, as he did not allow anyone to drink wine in the day-time (IV, 4, 43). (Sri P. V. Kane : History of the Dharmasastra, Volume III, page 147 and V.A. Smith, I.C.S. : The Oxford History of India (1919), p. 91).

But by the time of Asoka the evils of drink and gambling came to be so widely realised that under the powerful influence of a highly centralised government during a period of thirty-eight years the tradition of vegetarian food and non-alco-

holic drinking became the rule of the upper classes in Hindu Society (E. B. Hardell: History of Aryan Rule in India, p. 100).

So much so, Fa Hien, the Chinese Traveller, could write of the Gupta Empire of Madhyadesa " the people of this country kill no living creatures, nor do they drink intoxicating liquors, nor are there shambles or wine-shops round their markets ". (Travels of Fa-Hien : Beal's Trans., p. 55).

The religion of Islam strongly favoured abstention from intoxicating liquors and therefore Muslim Rule in India favoured prohibition. We have an interesting account of the measures taken by Alauddin Khilji in Elliott & Dowson : History of India, as told by her own historians, Volume III, Tarith-i-Firoz Shahi.

Alauddin, with a self-denial rare in a despot of his type, even put a check upon his own vices. Finding that his drinking habits impaired his efficiency as a war-lord, he gave up wine-parties entirely, prohibited wine-drinking and wine-selling, and the use of beer and intoxicating drugs. He ordered that the china and glass vessels of his banqueting hall should be broken. Jars and casks of wine were brought out of the royal cellars and emptied at the Badaun Gate in such abundance that mud and mire were produced as in the rainy season. Holes for the incarceration of wine-bibbers were dug outside the gate, and the severity of the punishment was such that many of them died. The terrors of these holes deterred many from drinking.

Turning to Southern India, both the inscriptions as well as Tamil literary works clearly show, that the consumption of intoxicating liquors was widespread among the lower middle-classses and warrior classes. On the spread of Buddhism and Jainism, fierce movements for restriction in the use of liquor set in and the classes of people connected with the tree-tapping and distillation of liquor came to be looked upon as occupationally degenerate classes (*e.g.*, Shanars). In fact an historical account can be written on this subject. But it is enough for our purpose here to give (*a*) two extracts from a history of South India and (*b*) an illustration of the public attitude towards drink by an extract from a well-known Tamil work, Thirumantiram.

No occasion was lost for holding a feast and the poets are most eloquent in their praise of the sumptuous fare to which they were so often asked. One poet declares to his patron :

" I came to see you that we might eat succulent chops of meat, cooled after boiling and soft like the carded cotton of the spinning-woman and drink large pots of toddy together ".

Another speaks of wine poured into golden goblets by smiling women decked with jewels in the Court of Karikala. The flesh of animals cooked whole, such as pork from a pig which had been kept away from its female mate for many days and fattened for the occasion, appam (pudding) soaked in milk the flesh of tortoises and paritícular kinds of fish are mentioned as delicacies served at such feasts. Among drinks particular mention is made of foreign liquor in green bottles, of *munir* (triple water) a mixture of milk from unripe cocoanut, palm fruit juice and the juice of sugarcane, and of toddy well matured by being buried underground for a long time in bamboo barrels. (K. A. Nilakanta Sastri : A History of South India, Second Edition, Oxford University Press, 1958).

Alcoholic drinks seem to have been very popular among the rich. The *bhogis* or the cultured persons of both sexes considered drinking liquor as a special mark of refinement. The most common beverage which they drank appears to have been the toddy drawn from the coconut palm. The taverns, with pandals of cuscus grass in their front, appear to have been the usual resorts of lovers, where they spent the moon-lit nights in each other's company.

The nobles, however, did not frequent the taverns, although they were more addicted to drink than the common people. There is reason to believe that a portion of the mansion of each nobleman was specially set apart for celebrating Bacchanalian festivities. In the summer season, they would adjourn to the *candrasala* allured by the brilliant moonlight. The *candrasala* was probably decorated for the purpose. The maids of honour, who played a prominent part on such occasions took particular care in arranging wine-pots brimming with liquor and cups

of gold and silver set with precious stones. Dishes containing delicious *upadamsanas* of meat were also placed by their side so that the revellers might nibble at them as a relish to drinking. Some of the popular varieties of liquor were *uspasava, talamadhu, alkasava, madirarasa, maireya* and *draksasava* besides *narikelasava* which has already been mentioned. The liquor was sometimes taken in a raw condition ; but it was customary to subject it to a process of concoction by adding some ingredients such as powdered camphor, in order to remove the disagreeable odour and make it more pleasant to the taste.

The convivial party would usually begin rather late in the night. The people comprising the party squatted on the ground in a circle around the wine-pots and sipped the wine slowly from the cups, nibbling at the relish every now and then. Sometimes, lovers exchanged their cups, probably to feel more at home in each other's company. Song and dance enhanced the gaiety of the occasion. They drank until they became thoroughly intoxicated. The behaviour of the young women attending the festivities of the *candrasala* is vividly described by a contemporary writer.

"One young woman who lost her balance completely tumbled down muttering words in an incoherent and indistinct fashion ; another laughed loudly and uttered obscene words and phrases causing delight to her lover ; one lost all sense of shame and strutted like a pigeon ; a few sang and frolicked, whereas several joined in a game of hide-and-seek. One of the young women in whom intoxication reached the highest pitch, having stripped herself of her clothing, went about the place in a naked condition."

Such seem to have been the pleasures which allured the people to the moonlit *candrasalas* ; but they did not wound the popular sense of decency, as they were strictly confined to the high-walled zenanas. (Sri N. Venkataramanayya: Studies in the History of the Third Dynasty of Vijayanagara, University of Madras Publication, page 398 and foll.)

Here is another contemporaneous account of Tamilnad between A.D. 50 to A.D. 150 :

"In the toddy-shop one was regaled with toddy and the fried flesh of the male pig which had been fattened by being confined in a pit and fed for many days on rice-flour. Toddy drawn from the cocoanut palm was drunk by the poor classes such as labourers, soldiers and wandering ministrels. Scented liquors manufactured from rice and the flowers of the *Thathaki* (Bauhinia Tomentosa) and other fragrant substances were used by the higher classes. Cool and fragrant wines brought from Yavana (or Greek) ships, which must have been therefore very costly, were the favourite drink of the Kings."

(Kanakasabai: The Tamils Eighteen-hundred Years Ago, Second edition, by the South India Saiva Siddhanta Works Publishing Society, 1/140, Broadway, Madras-1, page 125).

The cow fed on broth of rice wanders not from tank to tank ;
The cow denied its drink of broth grows weak and lank ;
Who swill the toddy neat, from righteousness go astray ;
Truest drink is Sivananda, the Bliss Supreme, far and away.

They drink and perish, who to the Vama sect belong, the lustful ones in sensual delights are wholly lost. But the pure souls find the Om's light in their inner flame ; They, who His true Name chant, approach Him fast.

* * * * * *

They, who soak in liquors, Truth ne'er can appraise.

* * * * * *

The fumes of wine stupor bring and destroy the truth, and make us seek the false, delusive joys of lust ; Such advance not to wisdom true, of sweet reason compact will such e'er attain the eternal bliss truest ?"

Bearing these facts in mind, we cannot say that after the length of time in which prohibition has come to be the statute of this State, there are any grounds to treat with leniency the sale of illicit liquor as contradistinguished from the consumption of liquor by addicts who cannot easily wean themselves from their habits and in whose case education and the help of institutions like Alcoholics Anonymous in the U.S.A. and elsewhere will wean rather than punitive measures.

This Revision is dismissed.

P.R.N. — *Revision petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE GANAPATIA PILLAI.

T. R. Tyagarajan .. *Appellant**

v.

The Official Liquidator and others .. *Respondents.*

Companies Act (I of 1956), sections 125 and 127—Scope and effect of—Unregistered charge created and acquired by a company—Validity—Difference between.

Section 125 of the Companies Act renders unregistered charges created by a company void against the Liquidator and the creditors of the company, though such an unregistered charge is not void for all purposes and would be binding on the company itself so long as it is a going concern. Section 127 of the Act deals with cases where a company acquires property subject to an unregistered charge and there is no provision in it rendering the charge not binding on the Liquidators or the creditors of the purchasing company. The word 'created' in section 125 (1) of the Act cannot in the context be given an extended meaning to include 'accepted' which is dealt with under section 127 of the Act.

On appeal from the Judgment and Order of Subrahmanyam, J., dated 9th September, 1958 and passed in the exercise of the Ordinary Original Civil Jurisdiction of Lower Court in Application No. 584 of 1958 in O.P. No. 317 of 1956.

R. Narasimhachari for *T. R. Arunachalam*, for the Appellant.

The Official Liquidator, the 1st Respondent.

V. V. Raghavan, for 2nd Respondent.

K. R. Vepa, for 3rd Respondent.

C. Vasudevan, for 4th Respondent.

The Order of the Court was made by

Rajamannar, C.J.—This is an appeal against the order of Subrahmanyam, J., passed by him on an application made by the appellant, T.R. Tyagarajan (Application No. 584 of 1958) to modify an order of the Official Liquidator, dated 27th January, 1958, passed in the course of the proceedings in the liquidation of a public limited company named Messrs. Kutty and Rao (Engineers) Ltd. The Indian National Industries, Ltd., were the managing agents of Kutty and Rao, Ltd. There was another private limited company called Sayanas, Ltd., of which the appellant claims to be a secured creditor for a sum of Rs 21,180. He alleged that Messrs. Sayanas, Ltd., gave a security for the sums advanced by him certain movable properties of the approximate value of Rs. 20,000.

They comprised Chandler & Price Folio Size Treadle	..	1
Hongkong-Half Crown Treadle	..	1
Chandler & Price 24" Cutting Machine	..	1
Perforating machine	..	1
Lead types	..	4000 lb.
Racks for types	..	50
Stands	..	12

Subsequently instead of the Indian National Industries, Ltd., Messrs. Sayanas, Ltd., were appointed as managing agents of Messrs. Kutty and Rao, Ltd. There was an agreement entered into, dated 11th May, 1955, in and by which it was *inter alia* agreed that there should be a transfer of the assets and liabilities of Sayanas, Ltd., to Kutty and Rao, Ltd. On 3rd June, 1955, the Board of Directors of Sayanas, Ltd., passed a resolution approving the agreement entered into by its managing director with the then managing director of Messrs. Kutty and Rao, Ltd. They further resolved to hand over the fixed assets and liabilities of the company at the time of handing over. On 25th June, 1955, the general body of Kutty and Rao, Ltd.,

*O.S. Appeal No. 82 of 1958.

20th March, 1959.
(29th Phalguna, 1880—Saka.)

passed an extraordinary resolution agreeing to accept the agreement mentioned above and to accept the taking over of the assets and liabilities of Messrs. Sayanas, Ltd., at the valuation approved by the board of directors. On 1st July, 1955, the board of directors of Kutty and Rao, Ltd., passed the following resolution :—

"That the business of Messrs. Sayanas, Ltd., be merged with this company from 25th June, 1955, tentatively the actual *de facto* merger to take place from the date of approval of the managing agency and issue of consideration shares to the managing agents."

On 11th March, 1957, Balakrishna Iyer, J., construed the effect of the above transactions to mean that there has been a transfer of the entirety of the assets and liabilities of Sayanas, Ltd., to Messrs. Kutty and Rao, Ltd. It is evidently on this footing that the appellant came to make his claim before the Official Liquidator in the winding up of Messrs. Kutty and Rao, Ltd. The claim of the appellant was made under three promissory notes, dated 10th November, 1952, 17th December, 1952 and 7th November, 1955, for Rs. 2,000, Rs. 8,000 and Rs. 6,000 respectively carrying interest at the rate of 12 per cent., 13 per cent. and 10 per cent., per annum. The Official Liquidator admitted the claim of the appellant for principal and interest due on the first two promissory-notes but refused to admit his claim in respect of the third promissory note because it had been executed on 7th November, 1955, after the date of the agreement between the two companies on 25th June, 1955. The appellant also claimed to be a secured creditor so far as the properties mentioned earlier in this judgment were concerned. He relied upon a letter given by I. S. Rao, managing director of Sayanas, Limited, on 17th December, 1952. The Official Liquidator refused to recognise this charge because it had not been registered with the Registrar of Companies and was, therefore, void against the Official Liquidator under section 125 of the Indian Companies Act, 1956. The appellant thereupon made an application, out of which this appeal arises, to the Judge dealing with Company matters praying that the order of the Official Liquidator may be modified by treating the appellant as a secured creditor for the amount claimed on the ground that even after the merger between Sayanas, Ltd., and Messrs. Kutty and Rao, Ltd., so far as the creditors of Sayanas, Ltd. were concerned, they were not to be affected by the merger and the provisions of Section 125 of the Indian Companies Act do not affect the right of the creditors of Sayanas, Ltd., who must be deemed to have the same rights against the company in liquidation so long as they were enforceable against Sayanas, Ltd., which had not gone into liquidation.

The only party to the application taken out by the appellant before Subrahmanyam, J., was the Official Liquidator but it appeared that there were other parties who were vitally interested in the claim made by the appellant as a secured creditor. There was one Kalyanji N. Suchede who had a mortgage executed on 16th August, 1956, over all the assets of Messrs. Kutty and Rao, Ltd., and there was also one P. B. Raju who held a mortgage of the properties of the company created in 1950 and there were also holders of debentures issued with a floating charge over all the assets of the company in liquidation. They were certainly proper parties to the appellant's application before Subrahmanyam, J., but notice was not taken to them. It was only on the last day of the hearing of the appellant's application that their advocates were heard. But they were not made parties. Before us they have been added as parties and their counsel were heard.

Subrahmanyam, J., dismissed the application of the appellant. Hence this appeal.

The following are the provisions of the Companies Act, 1956, in so far as they are material to the purpose of this appeal.

"SECTION 124.—'*Charge*' *to include mortgage in this Part*—In this Part, the expression 'charge' includes a mortgage.

SECTION 125.—*Certain charges to be void against liquidator or creditors unless registered.*—(1) Subject to the provisions of this Part every charge created on or after the 1st day of April, 1914, by a company and being a charge to which this section applies shall, so far as any security on the company's property or undertaking is conferred thereby, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the charge, together with the instrument, if any, by which the charge is created or evidenced, or a copy thereof verified in the prescribed manner, are

filed with the Registrar for registration in the manner required by this Act within twenty-one days after the date of its creation.

(2) Nothing in sub-section (1) shall prejudice any contract or obligation for the repaymen of the money secured by the charge.

(3) When a charge becomes void under this section, the money secured thereby shall immediately become payable.

SECTION 127.—*Registration of charges on properties acquired subject to charge.*—(1) Where a company acquires any property which is subject to a charge of any such kind as would, if it had been created by the company after the acquisition of the property, have been required to be registered under this Part, the company shall cause the prescribed particulars of the charge, together with a copy (certified in the prescribed manner to be a correct copy) of the instrument, if any, by which the charge was created or is evidenced, to be delivered to the Registrar for registration in the manner required by this Act within twenty-one days after the date on which the acquisition is completed ;

(2) If default is made in complying with sub-section (1) the company and every officer of the company who is in default, shall be punishable with fine which may extend to five-hundred rupees.

SECTION 134 (1).—It shall be duty of a company to file with the Registrar for registration the particulars of every charge created by the company, and of every issue of debentures of a series, requiring registration under this part ; but registration of any such charge may also be effected on the application of any person interested therein ".

Section 125 of the present Act corresponds to section 109 of the Indian Companies Act, 1913. Sections 127 and 134 (1) of the present Act correspond to sections 109-A and 116 (1) of the Act of 1913. The several sections are all based on the corresponding sections of the English Act. No direct authority on the question which calls for decision in this appeal was cited to us at the Bar. Learned counsel, however, relied on the observations in a few decisions to which we shall refer.

Obviously neither section 125 (1) of the Act of 1956 nor section 109 (1) of the Act of 1913 in terms applies to the facts of the present case if the properties belonging to Sayanas, Ltd., are deemed to have been conveyed by that company to Messrs. Kutty and Rao, Ltd., it is only Messrs. Kutty and Rao, Ltd., that is in liquidation. Sayanas, Ltd., as such, has not been wound up. The parties who oppose this appeal are not creditors of Sayanas, Ltd. They are only creditors of Messrs. Kutty and Rao, Ltd. It was on this footing that the learned Judge Subrahmanyam, J., disposed of the application before him. He starts by saying that certain properties which belonged to Messrs. Sayanas, Ltd., were transferred by them to Messrs. Kutty and Rao, Ltd., and one item of these prperties was subject to a charge created in favour of the appellant in 1952. In another part of his judgment the learned Judge proceeds on the footing that Messrs. Kutty and Rao, Ltd., purchased the property subject to a charge. Section 127 (1) which deals with a case where the company acquires any property which is subject to a charge requires the acquiring company to furnish particulars of the charge to the Registrar within 21 days after the date on which the acquisition is completed. But there is no further provision as is contained in section 125 that if the company fails to comply with this requirement the charge would be void against either the liquidator or the creditors of the acquiring company. Sub-section (2) of section 127 only provides that if default is made in complying with sub-section (1) the company and every officer of the company, who is in default, shall be punishable with fine. Nevertheless the learned Judge held that the unregistered charge in favour of the appellant was void not only against the liquidator and creditors of Messrs. Sayanas, Ltd., but also against the liquidator and creditors of the company which acquired the subject-matter of the charge. He came to this conclusion by construing the word " created " in section 125 (1) as including " accepted ." His reasoning can be set out in his own words :—

" It is obvious that in order that the policy underlying sections 125, 127 and 134 of Central Act I of 1956 (and the corresponding sections of the Act of 1913) might be given full effect to, it is necessary to construe the word " created " in section 125 (1) as including " accepted ". Where a charge is created by one company and the company or the charge-holder neglects to have the charge registered and the property subject to the charge is acquired by another company and such subsequent company also neglects to have the charge registered, then unless the word " created " is interpreted as including the word "accepted" the policy of the law that a charge not registered with the Registrar of Companies shoud be void as against the creditors or the liquidators would in cases like the present, be defeated."

He based this reasoning on a canon of statutory construction that where in order to give effect to the policy of an Act it is necessary to extend the literal meaning of a word, such extension is not only permissible but obligatory. The learned Judge thought that it would not be correct to hold that the content of the charge got enlarged by reason of the acquisition of the property by Messrs. Kutty and Rao, Ltd.

Learned counsel for the appellant contended that there was no warrant for the intepretation placed by Subrahmanyam, J., on sections 125 and 127 of the Indian Companies Act, 1956.

Section 125 in terms renders an unregistered charge created by a company void only against the liquidator and the creditors of that company. An unregistered charge is not void for all purposes. It is binding on the company itself, of course, so long as it is a going concern. So the argument ran. This argument is certainly supported by authority. In re *Monolithic Building Company, Tacon* v. *The Company*[1], Lord Cozens Hardy, M. R., made the following observations about an unregistered encumbrance :—

"Of course, the deed is not void to all intents and purposes. It is a perfectly good deed against the company so long as it is a going concern. It is not void to all intents and purposes but it is void as between the two incumbrancers."

Phillimore, L.J., said :

"We have to construe section 93 of the statute. It makes void a security ; not the debt, not the cause of action, but the security and not as against everybody, not as against the company grantor but against the liquidator, and against any creditor and it leaves the security to stand as against the company while it is a going concern."

The decision of the Rangoon High Court in *Aungbahzaya Co., Ltd.* v. *C. R. M. A. Chettiyar Firm*[2] is direct authority for the position that a mortgage created by a company if not registered with the Registrar as required by law is void only as against the liquidator and any creditor of the company but cannot be repudiated on that ground by the company itself while it is a going concern. The company could have sold away the very properties covered by the charge and with the proceeds repaid the charge-holder.

Learned counsel further relied on the contrast between sections 125 and 127 of the Act. Whereas in the case of an unregistered charge *created* by a company it is declared that the charge is void against the liquidator and the creditors of the company (section 125) when a company acquires a property subject to such a charge, there is no similar declaration that that charge is not binding against the liquidator or the creditors of the purchasing company.

Mr. Vepa in his able argument in support of the judgment under appeal contended that the learned Judge's interpretation accords with the policy underlying sections 125, 127 and 134 and to give effect to that policy it was permissible to give an extended meaning to the term " created ". He relied on the following observations of Buckley, J., in *Cardiff Workmen's Cottage Company Ltd.*, In re.[3]

"The purpose of the Act of Parliament in requiring within twenty-one days registration of securities on the company's properties is to ensure the means of notice to those who contemplate giving credit to the company".

It is not always safe to construe the language of an enactment to accord with the supposed intention of the Legislature. That is why Courts have been careful whenever they refer to the intention to confine it to the intention as expressed in the statute itself. Ample authority can be found in text-books on interpretation of statutes in support of a plain and literal interpretation of the words used in a statute as well as in support of an extension of meaning when such extension is considered necessary in certain circumstances. For the former rule of construction we may refer to the following observations of the Privy Council in *The Commissioner of Income-tax, Madras* v. *The Buckingham and Carnatic Company, Ltd.*[4]

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1. L.R. (1915) 1 Ch. 643 at 667.
2. (1927) I.L.R. 5 Rang. 585.
3. L.R. (1906) 2 Ch. 627 at 629.
4. (1935) 69 M.L.J. 879 : L.R. 63 I.A. 74 : I.L.R. 59 Mad. 175 (P.C.).

"When there is no ambiguity in the provisions of a section in an enactment the words must properly be construed in their ordinary and natural meaning. The Court cannot countenance a construction involving an insertion in the section of words which are not found therein and are not in the least necessary for an intelligible construction thereof".

In our opinion this is a salutary rule and departure from this rule can only be justified in extreme cases where the words construed in their ordinary and natural meaning clearly conflict with the obvious intention of an enactment as gathered from the enactment itself.

As Lord Macmillan said in *The Mayor, etc., Borough of New Plymouth* v. *The Taranaki Electric Power Board*[1].

"It is the rule that words are used in an Act of Parliament correctly and exactly and not loosely and inexactly. Upon those who assert that that rule has been broken the burden of establishing their proposition lies heavily."

After giving the matter our best consideration we are clearly of the view that the word "created" in section 125 (1) does not include in its meaning "accepted". It is not clear what the learned Judge meant by the word "accepted". Evidently he was referring to a case when a company acquires property with notice of and subject to a charge. For one thing if the word "created" is given an extension of meaning as to include also "accepted" in the above sense then there is no purpose served by section 127 because section 127 specifically deals with a case where a company acquires property which is subject to a charge which requires registration if it had been created by the company.

It must not be overlooked that a company may acquire a property subject to a charge created not by any company but by a private individual. In such a case what the company acquires is only the equity of redemption. To give a concrete cases suppose a company purchases immovable property worth Rs. 50,000 subject to a mortgage for Rs. 20,000 for a consideration of Rs. 30,000. This value obviously represents the value of the equity of redemption (Rs. 50,000 minus Rs. 20,000=30,000). We fail to see any justice or equity in holding that if the company making such a purchase fails to furnish the Registrar with particulars of the charge within the prescribed time, the mortgagee loses all his rights under the mortgage as against the liquidator or the creditor of the purchasing company. To so hold would mean that the liquidator and the creditors would have recourse to what could in no sense be described as assets of the company. In the illustration we have given above the creditors would become entitled to property worth Rs. 50,000 though all that the company purchased was only property worth Rs. 30,000. It is impossible for us to subscribe to this proposition. Under section 127 it is true that the acquiring company is directed to furnish the Registrar with particulars of the charge and for default in complying with this direction the company and the officers of the company are made punishable but section 127 does not purport to enlarge the extent of the property acquired by the company. Such a construction would be laying a premium on dishonesty. A company has only to acquire a property to a mortgage and deliberately fail to comply with the requirements of section 127 (1) and the result is that the creditors of the company will be benefited by having recourse to the property free of the mortgage. The mortgagee cannot be blamed at all because he took the mortgage from an individual under a registered deed and at the time of the mortgage there was nothing to compel either the mortgagor or the mortgagee to comply with the provisions of the Companies Act. Why should such a mortgagee lose the benefit of his mortgage when without his being a party to the transaction the mortgagor sells the equity of redemption to a company and that company fails to do its duty, that is, fails to furnish the Registrar with the particulars of the charge ? There is only one case to which we shall refer though it is not a direct decision on the construction of the language of the corresponding provision of the English Companies Act. In re *Connolly Brothers Ltd. Wood* v. *The Company*[2], the facts were these : A company issued debentures creating a floating charge upon their undertaking and all their properties one of the conditions of the deben-

1. (1933) 66 M.L.J. 67 (P.C.). 2. L.R. (1912) 2 Ch. 25.

tures being that the company should not be at liberty to create any other mortgage or charge in priority to the debentures. The company thereafter desiring to purchase certain property which they had not the money to pay for, borrowed £1000 from *O* upon terms that she should have a charge upon the property so purchased. The company then bought the property for £1,100 out of which £1,000 came from *O*. After the purchase the company executed in favour of *O* a memorandum of equitable charge upon the property for £1,000. It was held by the Court of Appeal that what the company acquired upon the purchase was only the equity of redemption in the property subject to the equitable charge of *O*, who was accordingly entitled to priority over the debentures. Cozens-Hardy, M. R., tersely put it :

"We should be shutting our eyes to the real transaction if we were to hold that the unincumbered fee simple in the property was over in the company so that it became subject to the charge of the debenture-holders."

If Kutty and Rao, Ltd., purchased a certain property from Sayanas, Ltd., on the footing that it was subject to a charge in favour of the appellant and the consideration paid by Kutty and Rao, Ltd., represented only the equity of redemption then it would be not only be shutting our eyes but also perpetrating an injustice if we were to hold that the creditors of Kutty and Rao, Ltd., would have the benefit of the purchased property free of the charge subject to which it was purchased simply because Kutty and Rao, Ltd., failed to do their duty laid on them under section 127 (1) of the Act. If it were necessary to decide this case on the footing that Kutty and Rao, Ltd., purchased the property over which the appellant held a charge then it would have been necessary to go into the facts to ascertain what exactly was purchased and subject to what terms and conditions.

But in our opinion this appeal can be disposed of on a short ground. From the records it appears that Kutty and Rao, Ltd., took over the entire assets and liabilities of Sayanas, Ltd., by the transactions referred to earlier on in this judgment. It was because of this fact that though it was only Kutty and Rao, Ltd., which went into liquidation the creditors of Sayanas, Ltd., were also permitted to file their claims before the Official Liquidator. In paragraph 5 of the affidavit filed on behalf of the appellant it is stated that in the winding up proceedings the creditors of Sayanas, Ltd., had also been directed to file their claims relating to the respective amounts due to them. The Judgment of Balakrishna Iyer, J., dated 11th March, 1957, in Application No. 2799 of 1956 is based on this assumption. He *inter alia* stated :

" As I read the documents, there has been a transfer of the entirety of the assets and liabilities of Sayanas, Ltd., to Kutty and Rao (Engineers), Ltd."

The learned Judge, therefore, held that the Official Liquidator would be entitled to collect all the moneys due and payable to Sayanas, Ltd. It follows that on and after the date of such transfer the appellant must be deemed to be a creditor of Kutty and Rao, Ltd., and Kutty and Rao, Ltd., is in liquidation. The appellant, cannot, therefore, rely on his unregistered charge as against the other creditors of Kutty and Rao, Ltd., who would include also the other creditors of Sayanas, Ltd. This flows from the provisions of section 125 (1) read without giving any extended definition to the word " created ". It follows that the claim of the appellant to be recognised as a secured creditor was rightly rejected by the Official Liquidator and by the learned Judge.

The appeal fails and is dismissed but in the circumstances, there will be no order as to costs.

R.M. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI AND MR. JUSTICE SUBRAHMANYAM.

S. RM. AR. S. SP. Sathappa Chettiar .. *Petitioner**

v.

AR. RM. Umayal Achi and another .. *Respondents.*

Constitution of India (1950), *Article* 133 (1)—*Construction and scope*—"*Court immediately below*"—*Meaning of*—*High Court on Original Side presided over by single Judge*—*If* "*Court below*" *High Court on Appellate Side*—*Substantial question of law*—*Question of law well settled*—*Ground of appeal raising such question*—*Leave to appeal*—*Interpretation of Statutes*—*Meaning of words* "*harmonious construction*".

The words " the Court immediately below " in the last paragraph of Article 133 (1) of the Constitution of India, in relation to the High Court on the Original Side, when it is presided over by a single Judge, are the equivalent of the words " the Court of first instance " occurring in clause (*a*) of Article 133 (1) ; for the purposes of Article 133 (1), therefore, the High Court on the Original Side, presided over by a single Judge, is the Court immediately below the High Court on the Appellate Side.

Tulsi Prasad Bhakt v. *Benavek Misser,* (1896) L.R. 23 I.A. 102 : I.L.R. 23 Cal. 918 (P.C.), *Probhawati* v. *Panmal,* (1941) 45 C.W.N. 1002, relied on.

This does not, however, entail the consequence that the High Court in the Original Side is a Court subordinate to the High Court on the Appellate Side, or that the orders passed by the High Court on the Original Side are liable to be revised or otherwise interfered with in the exercise of the revisional or supervisory jurisdiction of the High Court under Article 227 of the Constitution or section 115, Civil Procedure Cocde.

Sahaba Reddy v. *Venkata Reddy,* (1953) 2 M.L.J. 108, and *A.K.D. Rangaswami Raja,* In re, (1957) 1 M.L.J. 364, followed.

Obiter : The High Court when presided over by a single Judge and exercising its appellate jurisdiction is not a Court immediately below the Division Bench of the High Court to which an appeal may be preferred from the appellate judgment of the single Judge.

Deoki Nandan v. *State of Uttar Pradesh,* A.I.R. 1959 All. 10 and *Kishanlla* v. *Vithal,* A.I.R. 1956 Nag. 276, dissented from.

Dabendra Nath Das v. *Bibudhendra Mansingh,* (1915) I.L.R. 43 Cal. 90 and *S. K. Wahid-Ud-din* v. *Makhan Lal,* A.I.R. 1944 Lah. 458, followed.

In every compromise in a suit or appeal, material questions are left undecided, but that is no ground for holding that a party to a decree, based on the compromise, can institute a fresh suit to have such questions decided. A material question may be left undecided by the Court because the parties agree that it may be left undecided on the ground that the suit has been settled by a lawful compromise. The parties' agreement that the issue may be left undecided would bar, on the ground of *res judicata,* the trial of that issue in any subsequent litigation with reference to the same subject-matter. Provided the settlement was fair and was entered into after due consideration of the interest of all parties, the agreement to leave the issue undecided would be conclusive. Neither a party thereto nor his representative could thereafter claim that the decision of that issue was necessary for the determination of the rights of the parties and their representatives.

That a father and manager of a joint Hindu family has power to bind his minor sons by a *bona fide* settlement of disputed claims has been well settled and undoubted law since 1914 (vide *Venkatagiri* v. *Subbarayalu,* 24 I.C. 491). When both the Courts below have found that a compromise entered into by a Hindu father was a *bona fide* compromise of disputed claims and was binding on his son and that he was precluded from raising an issue which was left undecided by agreement of parties who compromised the suit, it must be held that there is no " substantial question of law " within the meaning of Article 133 (1) of the Constitution.

One of the cardinal principles of construction of statutes is that the words of a statute, when there is a doubt about their meaning, are to be understood in a sense in which they best harmonise with the subject of the enactment and the object which the legislature had in view.

Maxwell on Interpretation of Statutes, 10th edition, page 52, referred to.

Petition under Article 133 (1) (*a*), (*b*) and (*c*) of the Constitution of India and sections 109 and 110 of the Code of Civil Procedure and Order 45, rules 2, 3, 7 and 8, Civil Procedure Code praying that in the circumstances stated therein the High Court will be pleased to grant leave to the petitioner herein to appeal to the Supreme Court of India against the Judgment and Decree of the High Court, dated, 23rd January, 1959 and passed in O.S.A. No. 2 of 1958, preferred to the High Court

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* S.C. Petition No. 17 of 1959. 1st April, 1959. (11th Chaitra, 1881, Saka.)

(Appellate Jurisdiction) against the decree of the Hon'ble Mr. Justice Ramaswami Gounder, dated 22nd September, 1953 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 311 of 1951.

K. V. Venkatasubramania Ayyar and *P. S. Sarangapani Ayyangar*, for Petitioner.

V. Tyagarajan for *T. Venkatadri*, for Respondents.

The Order of the Court was pronounced by

Subrahmanyam, J.—The petitioner, as plaintiff, instituted C.S. No. 311 of 1951 on the file of this Court. It was dismissed on 22nd September, 1953, by Ramaswami Goundar, J., sitting on the Original Side of this Court. The petitioner's appeal from that judgment and decree, *viz.*, O.S.A. No. 2 of 1958, was dismissed by us sitting as a Division Bench of this Court on 23rd January, 1959. The petitioner applies that a certificate be granted to him under Article 133 of the Constitution to enable him to appeal to the Supreme Court from the judgment and decree pronounced in O.S.A. No. 2 of 1958.

Article 133 (1) of the Constitution (so far as material) is in these terms :

"ARTICLE 133 (1).—An appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies—

(*a*) that the amount or value of the subject-matter of the dispute in the Court of first instance and still in dispute on appeal was and is not less than twenty thousand rupees . . . . or

(*b*) . . . . or

(*c*) that the case is a fit one for appeal to the Supreme Court ;

and where the judgment, decree or final order appealed from affirms the decision of the Court immediately below in any case other than a case referred to in sub-clause (*c*), if the High Court further certifies that the appeal involves some substantial question of law ".

It is beyond question that the amount or value of the subject-matter of the dispute in the Court of first instance and still in dispute on appeal was and is not less than Rs. 20,000. Petitioner's learned counsel says that that fact is by itself sufficient to enable him to appeal to the Supreme Court against the judgment in O.S.A. No. 2 of 1958 and requests us to say so. His contention is that, although the judgment affirmed the decision of Ramaswami Goundar, J., his decision cannot be said to be the decision of the Court immediately below the Court constituted by the Division Bench of the High Court and that, therefore, it is not necessary for the petitioner to have a further certificate that the appeal involves some substantial question of law. If, on the other hand, we take the view that the High Court on its Original Side should be regarded as a Court immediately below the High Court on the Appellate Side, the petitioner's learned counsel requests that we certify that the appeal he proposes to institute involves a substantial question of law.

The first question for decision is whether the High Court on its Original Side, when a single Judge presides over it, is a Court immediately below the High Court on its Appellate Side for the purposes of Article 133 (1) of the Constitution. From the decision of a single Judge sitting on the Original Side of the High Court, a party aggrieved has a right of appeal to the High Court under Clause 15 of the Letters Patent. But, notwithstanding that incident of the appealability of his judgment to the Appellate Side of the High Court, the Court over which a Judge sitting on the Original Side presides is the High Court and not a Court other than the Court which hears the appeal from his decision. All the powers of the High Court as a Court of Record and as the highest Court in the State are his when he presides over the Original Side in no less a measure than when he presides on the Appellate Side. Since the High Court on the Original Side and the High Court on the Appellate Side form together the High Court, there is no room, technically speaking, for the application of the words " Court below " in regard to the trial of a suit in the High Court and the appeal from the decision to the High Court. The division into ' original ' and ' appellate ' is a division by a vertical, and not by a horizontal line. But it is nonetheless true that the High Court trying a suit on the Original Side is the Court of first instance in relation to that litigation. Article 133 (1) (*a*)

uses the words " the Court of first instance ". The latter part of Article 133 (1) uses the words " the Court immediately below ". While the High Court on the Original Side cannot be said, in the ordinary sense of those words, to be immediately below the High Court on the Appellate Side, the High Court may properly be said to be at the same time the Court of first instance and the Court of appeal. The point for decision thus resolves itself into whether, in relation to the Original Side of the High Court, the expression, " the Court immediately below" in Article 133 (1) should not be construed as the equivalent of " the Court of first instance " occurring in the same Article.

One of the cardinal principles of construction is that the

> " words of a statute, when there is a doubt about their meaning, are to be understood in the sense in which they best harmonise with the subject of the enactment and the object which the Legislature has in view ".[1]

In construing the provisions of a Constitution, particularly, the principle, *viz.*, that the object to be achieved should be constantly kept in mind, is of overriding importance. It is on that principle that several guide-posts in the field of constitutional law—the doctrine, for example, of " the pith and substance of an enactment " with a view to decide under what category of subjects of legislation the enactment falls stand firmly rooted. As one writer put sit, the thing to do in construing the words used in a Constitution is " to pick out the properties which the words connote."

Let us consider the object sought to be achieved by the clause in Article 133 (1) which provides that, if the judgment appealed from affirms the decision of the Court below, the High Court should certify that the appeal involves some substantial question of law. Obviously, the authors of the Constitution consider that, if the trial Judge and the Division Bench of the High Court sitting in appeal, arrive at concurrent findings on the matters in issue, there should be no appeal to the Supreme Court unless a substantial question of law is involved. In regard to suits tried on the Original Side of the High Court, that object would be defeated if we hold that the trial Judge cannot be regarded as a Court immediately below the High Court on the Appellate Side. In the case before us, the suit instituted by the plaintiff might have been instituted in the Court of the Subordinate Judge, Devakottai. If he had done so and the Subordinate Judge had pronounced judgment dismissing the suit and a Division Bench of this Court affirmed the decision of the Subordinate Judge, there could be no further appeal to the Supreme Court unless the High Court certified that the appeal involved some substantial question of law. But the suit was instituted and tried on the Original Side on the High Court. If we place on the words " the Court immediately below " their ordinary meaning, and hold that the Court on the Original Side is not a Court below the High Court on the Appellate Side, there would be a right of appeal to the Supreme Court from the judgment pronounced by the Division Bench, notwithstanding that the appeal may not involve any substantial question of law. That is to say, concurrent findings recorded by a Judge on the Original Side and by Judges constituting a Division Bench would be of less significance than concurrent findings recorded by a Subordinate Judge and Judges constituting a Division Bench. That is a clear indication that, in this case, we should look not at the plain meaning of the words used but at the properties which the words connote. In relation to a suit tried on the Original Side of the High Court, what is material is that the Court is a Court of first instance. That it is not a Court below the Court of appeal is an accidental circumstance. On principle, therefore, it seems to us that the words " the Court immediately below " in relation to the High Court on the Original Side, when it is presided over by a single Judge, are the equivalent of the words "the Court of first instance" occurring in the same article, and that, for the purposes of that Article, the High Court on the Original Side, when it is presided over by a single Judge, should be regarded as the Court immediately below the High Court on the Appellate Side.

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1. Maxwell on Interpretation of Statutes (10th edn.) page 52.

Were the matter historically considered, the conclusion, in our opinion, would be the same. The Privy Council did not entertain appeals from judgments of High Courts in cases where such judgments affirmed the decision of the trial judge on the Original Side of the High Courts in what were then the Presidency Towns of Madras, Bombay and Calcutta. In *Tulsi Persad Bhakt* v. *Benavek Misser*[1], the Privy Council had to consider an appeal preferred from the decree of the High Court of Calcutta on the Appellate Side. In holding that the appeal could not be entertained, their Lordships said :

> " Their Lordships think that no question of law, either as to construction of documents or any other point, arises on the judgment of the High Court, and that there are concurrent findings of the two Courts below on the oral and documentary evidence submitted to them ".

Neither in the argument of the appellant's counsel nor in the judgment of their Lordships was any doubt cast on the proposition that the High Court, in trying the suit on the Original Side, was the Court immediately below the High Court on the Appellate Side which decided the appeal. In *Probhawati* v. *Panmal*[2], a Bench of the Calcutta High Court considered an application for leave to appeal to the Privy Council from a judgment of the High Court which had affirmed the decision of the High Court on its Original Side presided over by McNair, J. The petitioner's counsel argued that the High Court was one Court and, therefore, there was no such thing as a Court immediately below the Appellate Bench of the Court. In regard to that argument, Derbyshire, C.J., said :

> " That is a new argument to me and it seems to me that it is contrary to the usage that has prevailed with regard to the word ' Court ' in this particular respect. For instance, in the case of *Abdul Rahman* v. *D. K. Cassim and sons,*[3] Sir George Lowndes, referring to the Rangoon High Court, said :
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> ' It does not appear, however, to have been objected before the Appellate Court that the question was not open to the first Respondent, or that they had ceased to be parties to the suit before the decree of the trial Judge was made, and their Lordships are not prepared now to take any account of the very apparent irregularities in the trial Court '.
>
> The ' trial Court ' is clearly the Court below the Appellate Court and I see no reason why Mr. Justice McNair, sitting as he was, was not the Court immediately below the Bench which has heard the appeal from him.
>
> That being so and the order appealed from being one of affirmance, and no question of law arising (because in each case the Court exercised its discretion upon the facts which were before it in determining the amount in respect of the marriage), I am of the opinion that no certificate of fitnes for leave to appeal to His Majesty in Council can be granted in this case. The application is, therefore, dismissed with costs."

The Constituent Assembly, when it framed the Constitution, knew that, in relation to judgments pronounced on the Original side of the High Court, it had been held that the High Court on the Original Side was the Court immediately below the Court on the Appellate Side. The inference is that the Constituent Assembly intended in regard to suits heard on the Original Side of the High Court that the expression " the Court immediately below" in Article 133 (1) of the Constitution should include the High Court in the exercise of its Original Jurisdiction.

The proposition that, for the purposes of Article 133 (1) of the Constitution, the High Court on the Original Side is a Court immediately below the Court on the Appellate Side does not by any means entail the consequence that the High Court on the Original Side is a Court subordinate to the High Court on the Appellate Side, or that the orders passed by the High Court on the Original Side are liable to be revised or otherwise interfered with in the exercise of the revisional or supervisory jurisdiction of the High Court under Article 227 of the Constitution or section 115 of the Civil Procedure Code. The legal position on that matter is, if we may say with respect, clearly explained in *Sahaba Reddy* v. *Venkata Reddy*[4] and In re *A. K. D. Rangaswami Raja and another*[5].

1. (1896) L.R. 23 I.A. 102 : I.L.R. 23 Cal. 918 at 921.
2. (1941) 45 C.W.N. 1002.
3. (1932) 64 M.L.J. 307 : L.R. 60 I.A. 76 at 79.
4. (1953) 2 M.L.J. 108.
5. (1957) 1 M.L.J. 364.

Our finding that the High Court on the Original Side, is, for the purposes of Article 133 (1), a Court immediately below the High Court on the Appellate Side is based substantially on the view that, in relation to the High Court, the words " the Court immediately below " should be construed as the equivalent of the words " the Court of first instance " used in the same Article. That argument would not be applicable to a judgment pronounced in appeal by a Judge of the High Court sitting singly. In such a case, there may be an appeal to a Divisional Bench of the High Court. Although that question does not arise in the present petition, we think it necessary to state that our finding that the High Court on the Original Side, when presided over by a single Judge, is the Court immediately below the High Court on the Appellate Side, does not involve the further proposition that the High Court, when presided over by a single Judge and exercising its Appellate Jurisdiction, would be a Court immediately below the Division Bench of the High Court, to which an appeal may be preferred from the appellate judgment of the single Judge. On that question, we find ourselves, with respect, in complete agreement with the views expressed in *Dabendra Nath Das* v. *Bibudhendra Mansingh*[1] and by Din Mohammad and Abdur Rahman, JJ., in *Sk. Wahid-ud-din* v. *Makhan Lal*[2]. Where, in a litigation, the High Court is at once the Court of first instance and the Court of appeal, there is no other Court which may be considered to be the Court immediately below the High Court. In such a case, the object sought to be achieved by Article 133 requires us to hold that the expression " the Court immediately below " includes the High Court on the Original Side. But, where a single Judge of the High Court hears an appeal from a subordinate Court there is that other Court which is immediately below the High Court, and the reason for holding that a single Judge sitting on the Original Side is immediately below the Division Bench on the Appellate Side disappears. The correct thing in that case is to regard the words " the Court immediately below " as connoting the properties of separateness and subordination and as referring only to the Court from whose judgment an appeal is preferred to the High Court.

On the question whether a Judge sitting singly exercising appellate jurisdiction represents a Court immediately below the Division Bench which hears an appeal from his judgment, a view different from the views expressed in *Dabendra Nath Das* v. *Bibudhendra Mansingh*[1] and *Sk. Wahid-ud-din* v. *Makhan Lal*[2] was expressed by the Nagpur High Court in *Kishanlal* v. *Vithal*[3]. Although, as we said, the question does not arise directly on this application, we are in agreement with the views expressed by the Calcutta and the Lahore High Courts, and are unable, with respect, to agree with the view taken by the Nagpur High Court. In *Deoki Nandan* v. *State of Uttar Pradesh*[4] a view directly opposed to ours has been taken. We have considered that judgment with care and are unable, with respect, to agree with the views expressed therein.

We hold that, for the purposes of Article 133 (1) of the Constitution, the High Court on the Original Side presided over by a single Judge is the Court immediately below the High Court on the Appellate Side.

The question then arises whether the proposed appeal involves some substantial question of law. Far from there being any substance, we are clearly of opinion that a bare statement of the facts would make it apparent that the plaintiff's suit is woven out of the flimsiest gossamer.

In 1930, the plaintiff's father, Subbiah Chettiar, instituted O.S. No. 33 of 1930 on the file of the Sub-Judge, Devakottai, praying for partition and separate possession of a half share of the properties which belonged to the S. BN. AR. estate. He valued the estate at Rs. 30,00,000. The half share claimed was, on that estimate, worth Rs. 15,00,000. The defendant in that suit was Ramanathan Chettiar, the son of Ramaswami. Ramaswami Chettiar was the youngest of three brothers, Sathappa, Veerappa and Ramaswami. Sathappa had died in 1876 ; Veerappa in 1896 ; and Ramaswami died in 1915. Sathappa and Veerappa had died issueless, while

1. (1915) I.L.R. 43 Cal. 90.
2. A.I.R. 1944 Lah. 458.
3. A.I.R. 1956 Nag. 276.
4. A.I.R. 1959 All. 10.

Ramaswami left a son about four years old. He was the defendant in O.S. No. 33 of 1930. Subbiah Chettiar claimed that Sathappa's widow, Lakshmi Achi, had adopted him as her and her deceased husband's son in 1922. That was a legitimate suit to bring. Ramanatha's defence was that the adoption was not true, and, if true, was not valid. Invalidity arose, according to Ramanatha, firstly, because there was alive at that time one Annamalai who had been validly adopted by Lakshmi Achi in 1888, and, secondly, because, for an adoption made by a widow without the authority of her husband who died as a member of a joint Hindu family, the consent of the surviving co-parcener is necessary, and because Ramanatha was a minor at the time of the alleged adoption of Subbiah, there could be no valid consent by any co-parcener. Those were legitimate defences to raise. O.S. No. 33 of 1930 was, beyond all doubt, one of those suits which our Courts are established to receive and try. The suit was duly tried. Judgment was pronounced by the Subordinate Judge in November, 1934, holding that Subbiah had been validly adopted by Lakshmi Achi in 1922 and declaring that he was entitled to a half share in the properties described in the plaint.

Against that judgment, Ramanatha preferred A.S. No. 16 of 1935 on the file of this Court. That appeal ended in a decree passed on a compromise. Under the compromise, Subbiah was given properties and moneys of the value of a little over Rs. 10,00,000, and he, on his part, agreed that Ramanatha would be entitled exclusively to the entire S. RM. AR. estate and that Subbiah would accordingly execute a deed releasing all claims to the estate on behalf of himself and his minor son, the plaintiff in this litigation. The parties agreed further that the question regarding the truth and validity of Subbiah's alleged adoption need not be decided in that litigation. The compromise was recorded. The decree passed by the Subordinate Judge in O.S. No. 33 of 1930 was set aside and a decree was passed in terms of the compromise. Ramanatha paid and delivered to Subbiah properties and funds of the value of over Rs. 10,00,000 as stated in the compromise, and Subbiah for himself and as guardian of his minor son, executed a deed of release in favour of Ramanatha.

The terms on which the appeal A.S. No. 16 of 1935 should, if possible, be compromised has been engaging Subbiah's attention from the summer of 1935. The compromise ultimately arrived at has been found by the trial Judge, and in the appeal, to have been a compromise entered into in good faith, after adequate thought and attention had been bestowed by Subbiah on the plaintiff's interests as well as his (Subbiah's) own.

It is now necessary to tell the plaintiff's interesting story as to how his claim arises. It appears that the plaintiff is a member of a joint Hindu family with Ramanatha and that the plaintiff's father (Subbiah) got himself divided from that joint family by the compromise and the decree in A.S. No. 16 of 1935 receiving lands and properties of the value of about Rs. 10,00,000 for his (Subbiah's) exclusive, individual benefit. Propounding that theory, the plaintiff claims a half share in the properties in Ramanatha's possession. Except that one has seen that case typed out in the form of a plaint, it would be hard to believe that a case of that kind would ever the presented to a Court of law.

O.S. No. 33 of 1930 was filed in March, 1930. Assuming that Subbiah had been validly adopted by Lakshmi Achi in 1922, as her and her deceased husband's son and had thereby become a member of a joint Hindu family with Ramanatha, Subbiah became divided in status from Ramanatha by the institution of that suit. The plaintiff was born in October, 1930. Since, on the assumption that Subbiah had been validly adopted by Lakshmi, he and Ramanatha were at the time of the plaintiff's birth divided members of the S. RM. AR. family. The plaintiff could not at the same time be joint in status with Subbiah and be joint in status with Ramanatha. One cannot imagine that the plaintiff himself believes that, when he was born, he was born joint in status with Ramanatha and divided in status from his father. Since, at the time of his birth, the plaintiff was joint in status with his father, he was undoubtedly born divided in status from Ramanatha. Subbiah had claimed in O.S. No. 33 of 1930 a half share in the properties of the

S. RM. AR. estate. That half, surely, did not belong to Subbiah individually, to the exclusion of the joint family consisting of himself and his son. The Subordinate Judge decreed the half share. That half share belonged to the joint family consisting of the plaintiff and his father, Subbiah. There was then a compromise which, on its terms, was entered into by Subbiah on behalf of himself and his son (the plaintiff). By no process known to human experience or to law could that compromise effect a separation between Subbiah and the plaintiff or enable Subbiah to carry away for his own individual and exclusive benefit the properties and funds of the value of over Rs. 10,00,000 which he received under the compromise and the decree, or cause the plaintiff to become joint in status with Ramanatha. Yet, that is the bottom of the plaintiff's case. Since the bottom is illusory, the case has no substance in it.

The plaintiff desires that the issue whether his father had been validly adopted by Lakshmi Achi should be heard and decided in this litigation. He, along with his father, is having the benefit of the funds and properties of the value of about Rs. 10,00,000 which the joint family consisting of the father and son received under the compromise and the decree in A.S. No. 16 of 1935. Let us suppose that the issue as to the adoption is tried in this litigation and it is found that the adoption is not true, or, if true, is not valid. Then, justice would require, that the plaintiff should lose at any rate his half share of the properties and funds which he and his father acquired as a result of the compromise and the decree. But he has deliberately refrained from impleading his father as a party and expressly claims that the funds and properties acquired as a result of the compromise are the father's exclusive property. The result would be that, if the adoption is found against, Ramanatha and his successors would still have lost what they gave. On the other hand, if the adoption is found to be true and valid, the plaintiff would gain something more. "Tails you lose, heads I win", is not a game that is played in our Courts. If the plaintiff frankly avowed that he and his father are members of a joint Hindu family, but that the compromise and the decree, though they might be binding on his father, are not binding on him (the plaintiff) and that he is, therefore, entitled to partition and separate possession of a fourth share in the family properties, and if the plaintiff, making his father a party to this litigation, subjected his (the plaintiff's) half share in the properties already obtained by the compromise and the decree, to the risk of being lost in the event of the alleged adoption being found either not true or not valid, the plaintiff would be instituting a suit of a kind known to law.

The argument pressed on us over and over again is that the truth and validity of Subbiah's alleged adoption has been expressly left undecided in A.S. No. 16 of 1935 and that that question remains, therefore, open for decision in this litigation. What the argument overlooks is that, in every compromise in a suit or an appeal, material questions are left undecided. That does not involve the proposition that a party to a decree based on the compromise could institute a fresh suit to have such questions decided. Even in the case of an ordinary suit on a promissory note, if the defendant, the alleged maker of the promissory note denies execution, and there is a compromise by which the defendant pays the plaintiff a portion of the sum claimed in settlement of the claim, and the plaintiff agrees to have the suit dismissed, the question whether the promissory note is genuine and supported by consideration is left undecided. For that reason, the plaintiff or the junior members of the joint Hindu family for whose benefit the suit was instituted, cannot institute a fresh suit and claim to have questions relating to the genuineness of the promissory note heard and decided. Provided the compromise was entered into in good faith and was reasonable from the point of view of the junior members, the compromise and the decree would bar, on the principle of *res judicata*, a fresh suit with reference to the same subject-matter.

In view, however, of the persistence with which the question was argued before us, undoubtedly with great ability, it is perhaps necessary that we explain the position further by means of an illustration. Let us suppose that *A* for himself and as manager of the joint family consisting of himself and his sons institutes a suit against *B* and *C*. The suit is for the recovery of properties, which, according to *A*,

had been purchased in *B*'s name with the funds of the family and for the benefit of the family, and which *B* had dishonestly alienated in favour of *C*. Let us suppose that *C* pleads that it is not true that the properties were purchased in *B*'s name benami for *A* and the members of his family and that, in any event, *C* is a purchaser for value and without notice of *A*'s title or claim. Let us suppose that the Court holds that it is unnecessary to decide whether the properties had been purchased by *A* for the benefit of his family in the name of *B* and that the Court decides only the other question and finds that *C* was purchaser for value and in good faith without notice of the title or claim of *A*. On that finding, the Court dismisses the suit and the decision becomes final. Is it, thereafter, open to a junior member of the family to institute a fresh suit asking for a decision on the question whether the properties had been purchased by *A* with the funds of the family and for the benefit of the family benami in *B*'s name ? Nobody would deny that the answer is, " No.". That, it may be said, is an obvious case, because the Court has expressly decided that the decision on the issue of the benami nature of the purchase was unnecessary for the determination of the rights claimed in the suit in relation to the properties. Now, let us take the other case. Let us suppose that the suit is not disposed of after trial but that *A*, *B* and *C* enter into a compromise in which they say expressly that the question relating to the benami character of the purchase in *B*'s name may be left undecided and that, since *C* has given, and *A*, on behalf of himself and the junior members of his family, has accepted, funds and properties roughly equal in value to two-thirds of the properties described in the plaint in satisfaction of the claim made in the suit, the suit may be dismissed. Let us suppose that the Court accepts the compromise and dismisses the suit and that *A* duly accepts on behalf of the family funds and properties as stated in the compromise. Let us suppose further that, in view of the doubtful nature of the claim and the unpredictability of the decision that the Courts might eventually give on the issues involved, the compromise is fair and reasonable from the point of not merely of *A* but also of his undivided sons. Could the undivided sons thereafter institute a suit with reference to the same subject-matter and ask for a decision on the issue regarding the character of the purchase in *B*'s name on the ground that the question of the character of the purchase had, by the compromise, been expressly left undecided ? The answer must be, " No. ". A material issue in a case might be left undecided by the Court when it gives its judgment after trial, because it considers the decision of that issue not necessary for the determination of the suit. In such a case, the Court's finding that the decision of the question is not necessary for the determination of the suit is conclusive between the parties. Similarly, a material issue may be left undecided by the Court because the parties agree that it may be left undecided on the ground that the suit has otherwise been settled by a lawful compromise. In that event, against the parties' agreement that the issue be left undecided would bar, on the ground of *res judicata*, the trial of that issue in any subsequent litigation with reference to the same subject-matter. The only qualification is that the compromise entered into should be a lawful compromise and, where it affects persons other than the person who enters into the compromise, the compromise should have been entered into with adequate regard to their rights and interests, as well as his own. In the case before us, the parties agreed that the issue as to the adoption be left undecided. They entered into that agreement because the subject-matter of the suit was otherwise settled. Provided that settlement was fair and was entered into by Subbiah after he had adequately considered the plaintiff's interests as well as his own, the agreement that the decision of the issue was not necessary for the determination of the suit was an agreement that was conclusive on that matter. Neither Subbiah nor the plaintiff could, thereafter, claim that the decision of that issue was necessary for the determination of the rights of the joint family consisting of the plaintiff and Subbiah in the properties belonging to the S. RM. AR. estate. So long as the compromise was within the power of Subbiah to enter into on behalf of himself and his undivided son, the decree passed on the compromise bars on the ground of *res judicata* the trial of any issue relating to the same subject-matter.

That a father and manager of a joint Hindu family has power to bind his minor sons by a *bona fide* compromise of disputed claims was declared in 1914 to be un-

doubted law (Please see *Venkatagiri Nayani* v. *Subbarayulu Nayani*[1]). On the facts, this Court held that the compromise entered into by Subbiah was a *bona fide* compromise of disputed claims. We are unable to see that any substantial question of law arises in the proposed appeal.

The alleged adoption was in 1922. Its validity depended in part on the truth and validity of an alleged adoption of 1888. Ramanatha, against whom the suit was instituted, is dead. The compromise was the result of thought and care bestowed over a period of years on the subject-matter of the litigation over which hundreds of thousands of rupees had been spent. We are happy that our conclusion would prevent this litigation from being fought any further from generation to generation.

The petition is dismissed. No costs.

P.R.N. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Appellate Jurisdiction).

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE GANAPATIA PILLAI.

The Joint Chief Controller of Imports and Exports .. *Appellant**

v.

H. V. Jain .. *Respondent.*

Imports and Exports (Control) Act (XVIII of 1947), *sections* 3 *and* 4-*A—Imports (Control) Order* (1955), *section* 3—*Import Trade Control Policy Book (July-December,* 1956), *section* 1, *Paragraphs* 13 *and* 74—*Applicability and scope of—Dissolution affirmed—Application for licence made by partner of dissolved firm not later than* 30*th November,* 1956—*Application kept pending, pending approval of Chief Controller of Imports and Exports, New Delhi—Subsequent refusal by Joint Chief Controller, Madras, to grant licence—Wrong interpretation of order of Chief Controller, New Delhi—Writ of* mandamus—*High Court's power to issue.*

The condition as to the approval of the Chief Controller of Imports and Exports in paragraph 75 of the Impoit Trade Control Policy Book (July-December, 1956) would have no application when a firm had been dissolved and the quota rights of the firm had been divided among the quondam partners. The rules as to such approval would apply only when there was a change in the constitution of the firm or change in the name of the firm or the business has changed hands.

Assuming, without deciding, that the approval of the Chief Controller of Imports and Exports is necessary before a licence is granted, there is no warrant for holding that the rights of the quondam partners could be recognised only on and from the date of approval by the Chief Controller. The material date is the date of the agreement of the partners to divide the business and the assets and liabilities of the firm. The date of the approval of the Chief Controller is not a relevant date at all. Under sub-clause (*b*) of paragraph 74, which clearly provides for the partners of the divided firm becoming entitled to their respective shares in the quota rights of the firm according to the provisions of the agreement, such rights would accrue to each of the partners from the date of the agreement. The fact that the approval of the agreement (assuming such approval is necessary) is given by the Chief Controller on a later date is no reason for holding that the rights of the partners would accrue only on and from the date of such approval. Decision in W.P. No. 569 of 1959 approved and followed.

Where an application for licence by a partner of a dissolved firm is made not later than 30th November, 1956, as provided in paragraph 13 of section 1 of the Import Trade Control Policy Book, and it is not rejected *in limine*, but kept pending till the approval of the Chief Controller of Imports and Exports, New Delhi, is secured, and subsequently the Joint Chief Controller of Imports and Exports, Madras, refuses to grant the application on a misinterpretation of the order of the Chief Contioller, New Delhi, he fails to do what he is bound to do, namely, to grant the application for licence, and therefore, in such a case the High Court would issue a writ of *mandamus* to the Joint Chief Controller of Imports and Exports, Madras, directing him to issue an import licence.

Appeal under clause 15 of the Letters Patent against the Order of the Hon'ble Mr. Justice Balakrishna Ayyar, dated 20th November, 1958, and made in the exercise of the Special Original Jurisdiction of the High Court in W.P. No. 107 of 1958, presented under Article 226 of the Constitution of India to issue a writ of *mandamus* directing the respondent therein to issue import licences to the petitioner therein on the basis of his succeeding to his share of the licence in the dissolved

1. (1914) 24 I.C. 491.

* Writ Appeal No. 19 of 1959.

21st April, 1959.
(1st Vaisakha of Saka, 1881.)

partnership of Messrs. Sha Bhagajee Sonmull, Madras, as and from 21st November, 1956.

M. K. Nambiar, for the Government Pleader (*B. V. Viswanatha Ayyar*) on behalf of the Appellant.

R. M. Seshadri, for Respondent.

Order of the Court was made by

Rajamannar, C.J.—This is an appeal from the judgment of Balakrishna Iyer, J., disposing of two writ petitions filed by the respondent H. V. Jain (W.P. Nos. 107 and 216 of 1958). The material facts are not in dispute. The respondent was a partner in a firm named Messrs. Sha Bhagajee Sonmull, Madras. The firm consisted of four partners and was doing business principally in import of various articles. The firm was recognised as an established importer in respect of the articles which it used to import. Owing to differences between the partners the firm was dissolved on and from 21st November, 1956. After dissolution, the respondent and the three partners submitted their applications individually for licences against quota rights of the dissolved firm. They were informed that their applications would be considered after the approval of the Chief Controller of Imports for transfer of quota rights. The licences applied for were for periods July to December, 1956, and January to June, 1957. By an order, dated 9th April, 1957, the Chief Controller approved the transfer of quota rights. The order was communicated to the firm by a letter which ran as follows :—

"Gentlemen,

With reference to the correspondence resting with your telegram, dated the 1st April, 1957, on the above subject, I write to say that instructions have been issued to the licensing authorities to the effect that quota licences admissible to the dissolved partnership of Messrs. Sha Bhagajee Sonmull, Madras, standing in their name should, in future be divided in equal ratio, *viz.*, 25 per cent. each between Bhagajee Sagarmal, Messrs. Sha Sonmull Vittajee, Messrs. Sha Suganraj Vittajee and Messrs. H. V. Jain and that no licences should be issued to the dissolved firm or to any of the newly formed proprietary concerns in excess of what they are entitled to on the basis of the above stated percentage.

You may now submit all the quota certificates of the dissolved firm before the concerned licensing authority for necessary endorsement.

Yours faithfully,
(F. Singh),
Assistant Controller,
For Chief Controller of Imports and Exports."

The Joint Chief Controller of Exports and Imports, Madras, who was the licensing authority granted licence to the respondent for January to June, 1957, but rejected his applications for July to December, 1956. The ground on which it was refused is contained in the communication, dated 10th January, 1958, and it runs as follows :—

"With reference to the above I write to say that the matter has been carefully considered in this office but it is regretted that your request for the issue of licence for the period, July to December, 1956, cannot be acceded to since the transfer of quota rights in your favour has been recognised by the Chief Controller of Imports and Exports, New Delhi, only after the expiry of the licensing period to which your application relates apart from the fact that the item is currently banned."

Thereupon the respondent filed the two writ petitions mentioned above. In W.P. No. 107 of 1958 he prayed for the issue of a writ of *mandamus* directing the Joint Chief Controller of Exports and Imports, Madras, to issue import licences to the petitioner on the basis of his succeeding to the share of the licences in the dissolved partnership firm of Sha Bhagajee Sonmull as and from 21st November, 1956. W.P. No. 216 of 1958 was for the issue of a similar writ of *mandamus* in respect of certain articles on the same basis (the date given as 21st November, 1956, is admittedly a mistake for 26th November, 1956). In the affidavit in support of the petition it was alleged that as the change in the firm consequent on the dissolution took place in November, 1956, the right to succeed to the quotas accrued as and from the said date and the approval by the Chief Controller was only administrative and could not confer or

create legal rights from any particular date. The Joint Chief Controller of Imports and Exports, Madras, who was the respondent filed an affidavit admitting the correctness of the facts set out in the affidavit filed in support of the petitions but denied that the order of rejection was illegal. He stated that a licence is necessarily personal and when it is granted to a firm of partners none of the partners of the dissolved partnership could claim that he is an established importer in his own right and the partners of the defunct firm do not become automatically eligible for quota rights after the dissolution. The Chief Controller of Imports and Exports divides the quota rights of the firm and sanctions appropriate shares to such persons as appear to be entitled on the material placed before him. It is only then that the separating partner becomes eligible for licence.

Balakrishna Iyer, J., held that the rights of the partners on dissolution is not postponed till such time as the Chief Controller of Imports and Exports recognises the transfer. He, therefore, allowed the writ petitions. Subsequently it was brought to the notice of the learned Judge that the import of coffee machines which formed the subject-matter of W. P. No. 216 of 1958 (*H. V. Jain v. The Joint Chief Controller of Imports and Exports, Madras*-1) was prohibited and in view of that, that petition was dismissed.

The Joint Chief Controller of Imports and Exports has filed the above appeal against the order of Balakrishna Iyer, J., in so far as it allowed W.P. No. 107 of 1958 and H. V. Jain has filed Writ Appeal No. 106 of 1958 against the order dismissing W.P. No. 216 of 1958.

To follow the contention of the parties it is necessary to refer to certain statutory and other provisions. Imports and Exports (Control) Act, 1947, was enacted to limit, restrict, or otherwise control imports and exports. Under section 3 of that Act the Central Government may, by order published in the Official Gazette, make provisions for prohibiting, restricting or otherwise controlling, in all cases or in specified classes of cases and subject to such exception, if any, as may be made by or under the order :—

"(*a*) the import, export, carriage coastwise or shipment as shipstores of goods of any specified description ; (*b*) the bringing into any port or place in India of goods of any specified description intended to be taken out of India without being removed from the ship or conveyance in which they are being carried,

In exercise of the powers conferred by sections 3 and 4-A of the Act the Central Government made an order on 7th December, 1955, called the Imports (Control) Order, 1955. Section 3 of the order provides :

"Save as otherwise provided in this order, no person shall import any goods of the description specified in Schedule I except under and in accordance with a licence or a customs clearance permit granted by the Central Government or by any officer specified in Schedule II."

It is common ground that the articles sought to be imported by H. V. Jain fall within the scope of section 3. Paragraph 13 of section 1 of Import Trade Control Policy Book for the licensing period July to December, 1956, prescribes that unless otherwise stated in the remarks column, applicants should ordinarily submit their applications complete in all respects on or before the dates specified against each category of importers. For the established importers, and admittedly Messrs. Sha Bhagajee Sonmull, Madras, came under this category, the last date was 1st October, 1956. It is further provided that

"applications received after the prescribed date will not be rejected and will be considered on merits ; but in that event the period of validity will be curtailed by the number of days the application has been delayed. No application made after 30th November, 1956, will be entertained."

" Established Importers " are persons or firms who have been actually engaged in import trade of the articles comprised in any one serial number or sub-serial number as the case may be, of the I. T. C. Schedule during at least one financial year (1st April to 31st March) falling within the basic period specified for the particular serial number. Such importers may choose the best year from the basic period for the purpose of obtaining quota certificates certifying the value of their best year's imports.

Paragraph 74 in so far as it is material runs thus :—

"74. The system of granting licences to established importers on the basis of their past imports has already been explained. Such licences are granted on the pre-supposition that no change has taken place in the constitution of the applicant firm. When a change occurs in the constitution or the name of the firm or the business changes hands, the reconstituted firm will not be entitled to the quotas of the original firm until the transfer of the quota rights in their favour has been approved by the Chief Controller of Imports and Exports or other licensing authority in cases covered by clause (*c*) below. The following are the general principles followed in regard to such cases :—

The expression 'firm' includes a partnership, a limited company or a proprietary business :—

(*a*) *Transfer of Quota Rights* :—

(i) Where the business of a firm is transferred together with all its assets, liabilities and goodwill to another firm so as to constitute it, its successor in all respects, the transferee firm shall get the quota rights of the transferred firm.

(ii) Where a firm is dissolved or wound up or ceases to carry on business without making provision for transfer of its business, assets, liabilities and goodwill no one will be entitled to the quota rights admissible to that firm.

(iii) Where a firm consists of several partners and its constitution undergoes change by retirement of some partners or admission of other partners, the reconstituted firm, continuing the original business in the same name and taking over all its assets and liabilities shall be entitled to get the quota rights of the original firm. But the retiring partners starting a new business whether in the same line or otherwise would not be entitled to get any quota rights.

(iv) Where a firm changes its name without any change in its constitution, its quota rights will be transferred to its new name provided it has ceased to do business in the old name and title.

(*b*) *Division of Quota Rights*:—

Where a firm is dissolved and the partners agree to divide its business, assets and liabilities and its goodwill is taken over by one of the partners or none of them is allowed to use it, the partners shall get their respective share in the quota rights according to the provisions of the agreement.

(*c*) *Limited Companies*:—

(i) Change of Managing director/directors of a limited company will not constitute a change requiring the transfer of quota rights.

(ii) Change in the name of a company made in pursuance of the Indian Companies Act, 1956 does not constitute a change involving transfer of quota rights."

Parties claiming transfer of quota rights are required to produce certain documents. This includes income-tax clearance certificate, cuttings of advertisement in two newspapers notifying claim for the transfer of quota rights and calling for objections against the proposed transfer to be sent to the Chief Controller of Imports and Exports, New Delhi, or other licensing authority, as the case may be, within three weeks from the date of advertisement.

In Appendix VI, the form of application for licence for established importers is given. The only relevant column in this application is Column 8 (*h*) namely :—

"Whether the constitution of the firm has undergone any change after the issue of the quota certificate to the firm ? If so quota number and the date of orders issued by the appropriate authority sanctioning transfer of quota rights in favour of the applicant."

It is not disputed that there was an application for licence which was not later than 30th November, 1956, and that application was not *in limine* rejected, but it was kept pending till the approval of the Chief Controller of Imports and Exports was secured.

Balakrishna Iyer, J., held that the approval of the transfer of quota rights of the original firm was a necessary condition for obtaining licence by the transferee firm only when there was a change in the constitution or the name of the firm or the business changes hands but this condition would not apply when a firm had been dissolved and the quota rights of the firm had been divided among the quondam partners. The rules as to approval of the Chief Controller of Imports and Exports would apply, according to the learned Judge, only when there was a change in the constitution of the firm, or change in the name of the firm or the business had changed hands. Though the learned Judge was inclined to hold that the third condition has been satisfied, namely, that the business had changed hands, he stated that

that alone was not sufficient. The rule further required that there should be a reconstituted firm. That condition was not satisfied in the present case. The learned Judge further held that in order to satisfy the requirement of the rule relating to division of quota rights, it is suffiicient if the four following conditions were present namely:—

(1) the firm must be dissolved, (2) the partners must have agreed to divide its business, assets and liabilities, (3) its goodwill must be taken over by one of the partners or none of them should be allowed to use it, (4) the agreement must contain some provision relating to quota. He saw no justification for the argument of the learned Government Pleader who appeared for the Joint Chief Controller of Exports and Imports, Madras, that in a case of this kind when there is a dissolution of the partnership the right of the partners is postponed till such time as the Chief Controller of Imports and Exports recognised the transfer. He relied on the decision of Rajagopalan, J., in W.P. No. 569 of 1955, *Itta Venkataramiah Chetty, Proprietor, Rao & Co., Madras* v. *The Deputy Chief Controller of Exports, Madras,* to which we shall refer later.

Mr. M. K. Nambiar for the Joint Chief Controller of Imports and Exports, Madras, contended that Balakrishna Iyer, J., had overlooked the specific provisions in paragraph 74 of the Import Trade Control Policy according to which the expression ' firm ' includes a partnership, a limited company or a proprietary business and that the learned Judge failed to see that the business carried on by Jain after the dissolution of the old partnership firm would be a proprietary business, and, therefore, it would be deemed to be a reconstituted firm. It is not necessary for us to decide this point for the disposal of these appeals. We shall assume without deciding that the business carried on by Jain after the dissolution of the partnership was or must be deemed to be a reconstituted firm. The only question then would be whether the rights of the quondam partners could be recognised only on and from the date of the approval by the Chief Controller of Imports and Exports and not from the date of the agreement among the partners to divide the business and the assets and liabilities of the firm. We agree with Balakrishna Iyer, J., that there is no warrant for such postponement of the rights of the erstwhile partners even assuming that the approval of the Chief Controller of Imports and Exports is necessary before licence could be granted. Once such approval is made, the rights of the partners would date from the time when the firm was dissolved and the partners had agreed to divide the quota rights. Mr. Nambiar admitted that the order of the Joint Chief Controller, dated 30th November, 1956, that the case would be considered later after the transfer had been approved by the Chief Controller related to the period July to December, 1956. Once that approval by the Chief Controller was communicated, such approval must be deemed to take effect from the date of the dissolution and the agreement between the partners. Much reliance was placed on the words " in future " occurring in the letter of the Chief Controller, dated 9th April, 1957. So far as we were able to discover from the papers placed before us by Mr. Nambiar there is nothing in the original order of approval expressly providing that the rights of the erstwhile partners to the quota would only come into existence on and after the approval of the transfer. Mr. Nambiar contended that Jain was not entitled as a matter of right to the grant of the application for licence on the footing that he became entitled to 25 per cent. of the quota rights in accordance with the terms of the dissolution agreement between the partners. The title to the proportionate quota certificate will date only from the date of the approval. So his argument ran. When Mr. Seshadri learned counsel for Jain mentioned instances where, in spite of the communication from the Chief Controller in identical terms, that is, that the quota licence would in furture be divided in equal ratio among the partners, licence had actually been granted for periods before the date of the approval, Mr. Nambiar conceded that it was open to the Chief Controller in his discretion to say that the quota rights would be recognised even for a period anterior to the date of approval and that it was open to the Chief Controller to direct the grant of licence for periods prior to his approval because there was nothing in paragraph 74 of the Import Trade Control Policy Book to limit his powers. We

are unable to agree with this interpretation of paragraph 74. That will be placing the applicants entirely at the mercy of the Chief Controller's discretion as there is no indication in what circumstances the Chief Controller could exercise such discretion. The decision of Rajagopalan, J., in W.P. No. 569 of 1959, *Itta Venkataramiah Chetty, Proprietor, Rao & Co., Madras* v. *The Deputy Chief Controller of Exports, Madras*, is in point. In that case there was a transfer of ownership of a proprietary concern by a registered sale deed dated 3rd December, 1954. On 4th February, 1955, the Chief Controller wrote to the purchaser that instructions had been issued to the licensing authorities to the effect that quota licence admissible to Messrs. Rao & Company, the original importer should in future be issued in favour of Sri Venkataramiah Chetty as its sole proprietor. The authorities declined to grant licence for the period prior to 4th February, 1955, on the ground that the transferee's rights could be recognised only with effect from 4th February, 1955. Holding that this was wrong, Rajagopalan, J., observed :—

"It is really a little difficult to understand the position taken by the respondent, that rights accrued to the petitioner only on 4th February, 1955. That was not a relevant date at all. The respondent was prepared to admit the devolution of the rights of Janardhana Rao on the petitioner by the sale held by the Official Assignee on 26th November, 1954. The sale-deed was registered on 3rd December, 1954. The devolution of rights was complete. It did not depend for its legal effect upon any recognition by the Chief Controller of Imports and Exports. But independent of that factor, even if 4th February, 1955, should be taken as the guiding date for which there is really no justification, the petitioner's application was on 7th February, 1955 and well within the period during which the quotas could have been issued and utilised by him. There was no real scope for misinterpreting even the letter of the Chief Controller of Imports and Exports dated 4th February, 1955, as the basis for refusing quotas."

We are in entire agreement with this reasoning. Sub-clause (*b*) of paragraph 74 is quite clear that where a firm is dissolved and the partners agree to divide its business, assets and liabilities, the partners shall get their respective shares in the quota rights according to the provisions of the agreement. Such rights would accrue to each of the partners from the date of the agreement. The fact that approval of the agreement (assuming such approval is necessary) is given by the Chief Controller of Imports and Exports on a later date, it cannot be said that the rights of the partners would accrue only on and from the date of such approval. The words " in future " can be understood to mean " from the date of the dissolution ".

Mr. Nambiar also contended that in any event no writ of *mandamus* could be issued to the Joint Chief Controller of Imports and Exports, Madras, because he was bound by the order of the Chief Controller of Imports and Exports, New Delhi, and if at all Jain was aggrieved, it was by the order of the Chief Controller who was not a party to these proceedings. We see no substance in this contention. The Joint Chief Controller rejected Jain's application for grant of licence on a misinterpretation of the order of the Chief Controller, New Delhi, and on account of such misinterpretation he failed to do what he was bound to do, namely, to grant the application for licence.

In the result Writ Appeal No. 19 of 1959 is dismissed with costs. Advocate's fee Rs. 250.

P.R.N. *Writ Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

K. N. Ganesh .. *Petitioner**

v.

The Chief Presidency Magistrate, Egmore, Madras and another .. *Respondents.*

Press and Registration of Books Act (XXV of 1867) as amended by Act (LV of 1955), sections 5 (2) and 6, Proviso—Scope and effect of—Application for making declaration as Publisher of Journal—Scope of inquiry—Jurisdiction of Magistrate—Rival claimant applying later—Power of Magistrate to assess comparative merits and to decide about right to use name or title or publication.

Under section 5 (2) of the Press and Registration of Books Act, 1867, as amended by Act LV of 1955, it is open to any person to declare his intention to start a newspaper. There is no restriction in the choice of a title or name of his newspaper, so long as there has been no newspaper of that name either in the same language in India or in the same State. If there were none such, there is no discretion left in the Chief Presidency Magistrate to direct the publisher to adopt any other name.

Section 5 does not invest the Chief Presidency Magistrate with jurisdiction to decide the matter as to who would be entitled to make a declaration. There is a limited jurisdiction given to the Magistrate under the Proviso to section 6 of the Act to enquire as to whether there is any other newspaper in the same language or in the same State having the same name by some other person ; but the Proviso to section 6 does not invest the Magistrate with jurisdiction to decide between two rival claimants for using the same name or title for their newspapers.

The duty of the Magistrate is merely administrative, *i.e.*, to record the declaration, or to refuse to authenticate it in the event of there being a newspaper of the kind referred to in the Proviso to section 6. If, on the date when a person applies to make a declaration with respect to his journal under a title or name, there was no published newspaper having the same or a similar title, he would be entitled to make the declaration under section 5 (2) and there would be no jurisdiction in the Magistrate to assess the comparative merits between him and his rival who applied later and decide as to which of them would be entitled to the name or title.

Section 5 (2) is not concerned with adjudication of rights. The question whether the applicant has acquired a right to use a particular name for his publication either by reputation or under the Trade Marks Act cannot be considered in proceedings under section 5 (2) ; the remedy in such a case lies in the civil Court.

History of Press Legislation in India traced.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in R.O.C. No. 4561/56-E, dated 19th November, 1956, on the file of the Chief Presidency Magistrate Madras, and quash the said order made therein.

R. Balakrishnan, for Petitioner.

The Additional Government Pleader (*K. Veeraswami*), for 1st Respondent.

The Court made the following

ORDER :—This is an application under Article 226 of the Constitution for the issue of a writ of *certiorari* or other appropriate writ calling for the record in R.O. C. No. 4561/56-E on the file of the Chief Presidency Magistrate and for quashing the order passed therein on 19th November, 1956.

The petitioner claims to have acquired for consideration the proprietorship of a Tamil quarterly journal entitled 'Manikkodi' from its original proprietor. It is stated that thereafter, that is on 3rd February, 1950, he declared himself a publisher of 'Manikkodi' under section 5 of the Press and Registration of Books Act of 1867 which shall be hereafter referred to as the Act. That was followed by the publication of a monthly short story journal under the name of 'Manikkodi' for sometime. The publication of the journal was discontinued thereafter ; however the petitioner was running his office in the same premises under the name of Manikkodi Kariyalayam dealing with books, journals, etc. He claims that his business operations and trading transactions had become associated in the mind of the

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* W.P. No. 1492 of 1956. 11th March, 1959.

public with the name of 'Manikkodi.' With a view to renew the publication of the journal the petitioner filed on 25th September, 1956, an application under section 5 (2) of the Act to make a declaration as a publisher of that journal.

Meanwhile one C. S. Krishna had applied and made a declaration on 11th August, 1956, to the first respondent for a similar purpose on the ground that he contemplated the starting of a journal under the name of 'Manikkodi'. That declaration, it is admitted, lapsed under the provisions of section 5 (2) A, so that on 25th September, 1956, there was only the application of the petitioner. On 31st October, 1956, the second respondent C.S. Krishna applied by means of a letter to the Chief Presidency Magistrate, Madras, that he intended to commence the journal as contemplated by him and applied to make a fresh declaration to that effect.

The Chief Presidency Magistrate, Madras, the first respondent obtained a report from the Police Commissioner and also the Press Registrar and heard both the petitioner as well as the second respondent and passed the following order on 17th November, 1956:

"Heard Mr. K. M. Ganesan and C.S. Krishnan. C. S. Krishna will be allowed to declare himself as Editor and Publisher of 'Manikkodi' ".

He followed this up with a communication to the petitioner R. O. C. No. 4561/56-E, dated 5th November, 1956, stating that as there was already a journal published by C. S. Krishna under the name of 'Manikkodi' the petitioner should change the title of his proposed journal. The assumption that C. S. Krishna had already published a journal under the name of 'Manikkodi' is inaccurate as he never implemented his declaration of 11th August, 1956, with a publication. The first respondent however by his order dated 19th November, 1956, allowed C. S. Krishna to declare himself as editor and publisher of the journal 'Manikkodi' and directed the petitioner to change the name of his proposed journal. The disappointed publisher has come forward with this application for quashing the order of the first respondent.

The contention on behalf of the petitioner is that on 25th September, 1956, when the petitioner applied to the Chief Presidency Magistrate to make the declaration in respect of his journal 'Manikkodi', there was no publication in existence of any journal of that name as the declaration made earlier by C. S. Krishna on 11th August, 1956, had by virtue of section 5 (5) of Act lapsed and that there was no impediment in his being allowed to make the declaration for his journal under the title 'Manikkodi'.

To appreciate and ascertain the scope of the jurisdiction of the powers of the Magistrate under section 5 it is necessary to refer briefly to the historical background. The first Press Ordinance was passed on December 18th, 1823, during the Governor-Generalship of John Adam. The Ordinance required that all matters printed in a press or published thereafter except certain specified items of news should be printed and published under licence from the Governor-General in Council. The application for a licence should give the name or names of the printer and publisher of the proprietors, their place of residence, the location of the press and the title of the newspaper, magazine, register, pamphlet, or other printed book or paper. A fresh licence was necessary if the printer or publisher or proprietor changed his address. There were also provisions which reserved to the Governor-General a right to call for a fresh application and the issue of such notice invalidated the previous licence, and there was also a power for resuming or recalling a licence, which was thereafter to be treated as null and void. A penalty was imposed for contravention of the provisions of the Ordinance. This Ordinance was, however, repealed by Act XXI of 1835 which was due to the efforts of the great champion of the Indian Press, Sir Charles Metcalfe when he was for a short time the Governor-General.

That Act provided for a declaration by the printer and publisher of a newspaper giving a true and precise account of the premises of publication with an obligation to inform the change of place in which case a fresh declaration was made necessary. There was also a penalty for non-declaration. The effect of that enactment was that no licence or previous permission was necessary for either publishing

or conducting a newspaper. A mere declaration alone was sufficient. The object of the declaration was to make known who the proprietor, printer or editor was in regard to a newspaper or other publication so that the responsibility for an improper publication might be fastened on the proper person. Any person who was a major could declare himself as a publisher and such declaration did not depend on the grant of a permission by any authority. Change of place of the publication or the publisher and of the latter leaving India necessitated a fresh declaration. Failure to make a declaration entailed penal consequences.

The Act underwent certain amendments in the subsequent years till finally Act XXV of 1867 was passed. It has been said that the Act is only a regulating Act. Section 5 makes it obligatory on all newspapers published in British India to be in conformity with the rules laid down thereafter. Section 5(2) states that the printer and publisher of every newspaper shall appear in person or by agent duly authorised before a Magistrate specified in that section and shall make and subscribe in duplicate a declaration that he is the printer or publisher or the printer and publisher of the newspaper entitled (enter the name of the paper) and printed at a particular place. The other provisions about change of place and also the necessity for a new declaration were also enacted. The Act was the subject-matter of scrutiny by the Press Commission, and as a result of their recommendations certain amendments were introduced in the Act under Act LV of 1955. Section 5 was amended by introducing certain new provisions. Sub-section (5) introduced by the amending Act is as follows :

> "Every declaration made in respect of a newspaper shall be void where the newspaper does not commence the publication (*a*) within six weeks of the declaration in the case of a newspaper to be published once a week or oftener and (*b*) within 3 months of the declaration in the case of any other newspaper and in every such case a new declaration shall be necessary before the newspaper can be published".

Sub-section (7) of that section states :

> "Where any other newspaper has ceased publication for a period exceeding twelve months every declaration made in respect thereof shall cease to have effect, and a new declaration shall be necessary before the newspaper can be republished ".

Sub-section (8) states :

> "Every existing declaration in respect of a newspaper shall be cancelled by the Magistrate before whom a new declaration is made and subscribed in respect of the name."

The first paragraph of section 6 has been amended by the introduction of a proviso. The former required that each of the two originals of every declaration made shall be authenticated by the signature and official seal of the Magistrate before whom the said declaration was made. The proviso to that section introduced by the Amending Act states :

> "Provided that where any declaration is made and subscribed under section 5 in respect of a newspaper, the declaration shall not, save in the case of newspapers owned by the same person, be so authenticated unless the Magistrate is satisfied from such inquiry as he thinks fit to make from the Press Registrar or otherwise that the newspaper proposed to be published does not bear a title which is the same as, or similar to, that of any other newspaper published either in the same language or in the same State ".

The proviso prevents any person from declaring himself as an editor or a publisher of a newspaper if there existed already a newspaper of that name either in the same language or in the same State. It was evidently intended to prevent unfair competition between two newspapers published by different persons under the same name and title. The proviso would have the effect of protecting an existing newspaper in regard to its name.

Under section 5 (2) of the Act it will be open to any person to declare his intention of starting a newspaper. There would be no restriction in the choice of a title or name of his paper: so long as there has been no newspaper of that name either in the same language in India or in the same State, he would be entitled to adopt that name for his publication. That would mean that on the date when he seeks to make a declaration under section 5 (2) there should be no other paper of that name and of the kind contemplated in the proviso to section 6. If there was none such, there

would be no discretion left in the Magistrate to direct the publisher to adopt any other name. Section 5 does not invest the Magistrate concerned with jurisdiction to decide the matter as to who would be entitled to make a declaration as editor of a newspaper with a particular name. It would follow that he who comes first should be entitled to make a declaration under section 5. Under the proviso to section 6 a limited jurisdiction is no doubt given to the Magistrate to enquire as to whether there is any other newspaper published in the same language or in the same State having the same name by some other person and if there was one such he should refuse to authenticate the proposed declaration. That provision does not invest the Magistrate with jurisdiction to decide between two rival claimants for using the same name or title to their newspapers. Under the law there is no right to prevent the use of a name by any person in connection with his trade or business except where one has acquired a property to it under the ordinary law or under the statutes like Trade Marks Act, etc. If two persons want to use the same name for their respective newspapers no question of right would arise for neither of them would have the exclusive right to a name. I have indicated already that the right to start a paper and to make a declaration does not depend on any licence to be granted by any authority. It follows that there could be no discretion on the concerned Magistrate to refuse to record a declaration except in the case provided for in section 6, Proviso. The duty of the Magistrate is merely administrative, that is to record the declaration or to refuse to authenticate it in the event of there being a newspaper of the kind referred to in the Proviso to section 6. If, therefore, on the day when the petitioner applied to make a declaration with respect to his journal under the title of 'Manikkodi' there was no published newspaper having the same or similar title, he would be entitled to make the declaration under section 5 (2) and there would be no jurisdiction in the Magistrate to assess the comparative merits betweeen him and a rival who applied later and decide as to which of them would be entitled to the name or title.

I cannot however agree with another contention urged on behalf of the petitioner. In the petition it has been suggested that the petitioner had a property in the name 'Manikkodi' by reason of the public associating his publications with that name. That question cannot be considered in proceedings under section 5 (2) of the Act which as I stated is not concerned with adjudication of rights. If the petitioner has acquired a right to use a particular name for his publication either by reputation or under the provisions of the Trade Marks Act, the remedy for him will be in the Civil Court.

Though no question of title is involved, permitting the publication of a newspaper or journal under the same name or title adopted by an existing publication may lead to fraud, confusion or affect the reputation of the existing paper or occasion pecuniary loss to its proprietors. The Proviso to section 6 is intended to safeguard an existing newspaper and it imposes a limit to the otherwise unrestricted right of a newcomer in regard to the choice of a title to his paper.

A difficulty may no doubt arise in a case where two persons simultaneously want to make a declaration in respect of a newspaper having a particular name. There is no provision under the Act for deciding a dispute in such cases.

In the present case, however, there is no such difficulty. Admittedly the declaration made by C. S. Krishna had lapsed and on 25th September, 1956, when the petitioner sought to declare himself as the Editor of 'Manikkodi,' there was no subsisting journal of the name of 'Manikkodi.' The petitioner having applied to make the declaration at a time when Krishna's declaraction had lapsed would be entitled to make a declaration in respect of his journal 'Manikkodi' before the first respondent under section 5 (2).

The learned Chief Presidency Magistrate was, therefore, in error in proceeding to decide between the second respondent and the petitioner. There is, however, one impediment in the way of issuing the writ to quash the purported judicial order. It is admitted that neither the petitioner nor C. S. Krishna ever commenced any publication of any journal under the name of 'Manikkodi' after the date of the order

of the first respondent. It may be that after that date another person might have started a journal of that name. In the absence of evidence in regard to that matter a writ quashing the order and directing the Chief Presidency Magistrate to allow the petitioner to make a declaration could not be issued. The petitioner can now apply to the Magistrate again under section 5 and if the Magistrate finds there is no prohibition under the proviso to section 6, for allowing him to make the declaration that he desires, he would be entitled to make the declaration.

With these observations this petition is dismissed. There will be no order as to costs.

P.R.N. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE GANAPATIA PILLAI.

Working Journalists of 'Tamil Nadu' represented by the Madras Union of Journalists, Madras .. *Appellant**

v.

The Management of "Tamil Nadu" Madurai and others .. *Respondents.*

Industrial Disputes Act (XIV of 1947) and Industrial Employment (Standing Orders) Act (XX of 1946)—Termination of employment—Reinstatement of employees—Jurisdiction of the Tribunals under the Act—Standing Orders—Scope of—Mistake in reference.

It is now well-settled that the regulation of the relation between industrial managements and their employees or workmen falls outside the realm of contract.

The Second and the Third Schedule to the Industrial Disputes Act cannot certainly be construed as defining the powers of the labour Courts or the industrial tribunals to the grant of particular reliefs. A perusal of the items makes it clear that the second and third schedules are concerned with the division of functions between the sets of tribunals, *i.e.*, labour Courts and industrial tribunals.

Item 3 of Schedule 2 cannot obviously be construed literally which mentioned as a matter falling within the jurisdiction of the labour Court, the discharge of workmen but which does not mention the grant of any relief to workmen wrongfully discharged.

If a dispute as regards the termination of workmen is a matter falling within the jurisdiction of the labour Court there is no restriction in the Act as to the relief which could be granted to the workmen if the labour Court finds that the termination was wrongful.

While it is clear that termination of employment without proper notice would be *ipso facto* bad it does not follow that a termination even after the prescribed notice cannot be impugned on the ground that such termination though ostensibly conforming to the Standing Orders, was actuated by improper motives. The power of a labour Court or an industrial tribunal is not in any way affected by the provisions of the Industrial Employment (Standing Orders) Act, 1946 or Standing Orders maintained for industrial establishments in accordance with the Act.

Where the objection to the jurisdiction of the labour Court on the ground of a mistake in the reference was not raised at the first instance and where the mistake is an inadvertent one which has not prejudiced the management or caused any injury the High Court is not bound to interfere.

The question whether the management of an industrial concern can terminate the services of any of its workmen merely on the ground that other workmen with superior qualifications may be employed was not decided.

Appeal under clause 15 of the Letters Patent against the Order of the Hon'ble Mr. Justice Balakrishna Ayyar, dated 9th September, 1958 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P. No. 184 of 1958 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records in I.D. No. 1 of 1957 on the file of the Labour Court, Madurai, and to quash the order dated 12th February, 1958, made therein.

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*Writ Appeal No. 111 of 1958. in W.P. No. 184 of 1958. 24th March, 1959. (3rd Chaitra of Saka 1881).

S. Mohankumaramangalam, for Appellant.

V. Tyagarajan, R. Viswanathan, G. Ramanujam, for Additional Government Pleader (*K. Veeraswamy*), for Respondents 1 to 3.

The Order of the Court was made by

Rajamannar, C.J.—This is an appeal against the Judgment of Balakrishna Ayyar, J., in W.P. No. 184 of 1958 filed by the management of a Tamil daily newspaper called 'Tamil Nadu' which is being published from Madurai. Ponnuswami, Subramanian and Ramiah were working as proof-readers for this newspaper. The Working Journalists (Conditions of Service) and Miscellaneous Provisions Act (XLV of 1955) came into force on 20th December, 1955. In exercise of the power conferred under section 8 of the Act, the Central Government appointed a board to fix the rates of wages for working journalists in newspaper establishments. The decision of the Wage Board was published on 11th May, 1957. According to that decision establishments were classified into five classes on the basis of their gross revenue. 'Tamil Nadu' falls under Class 'E'. The Board classified the working journalists into four groups and in the schedule published along with their decision the functions of the various categories of working journalists were given. Proof-reader is placed in group 4 and his functions are defined as follows :

"Proof-reader is a person who checks up printed matter or proof with edited copy to ensure strict conformity of the former with the latter. Factual discrepancies, slips of spelling, grammar and syntax may also be discovered by him and either corrected or got corrected."

The Wage Board fixed Rs. 90 as the starting pay for a proof-reader in Class E newspaper establishments. In addition to this basic wage, the proof-reader is also entitled to dearness allowance and location allowance. It is common ground that a proof-reader working in 'Tamil Nadu' at Madurai was entitled to a sum of Rs. 138-3/4 as his total emoluments. The three individuals abovementioned were actually receiving far less than this sum. Within ten days of the publication of the decision of the Wage Board the management of 'Tamil Nadu' served an order on Ramiah who had been working as proof-reader from 1951 transferring him to work in a job printing press called Visalakshi Achagam which was not connected with the newspaper establishment. Ramiah protested against the transfer which would deprive him of the benefit under the Act but obeyed the order of the management. At the same time he brought the matter to the notice of the Madras Union of Journalists of which he is a member to take up his complaint with the management. Eventually Visalakshi Achagam terminated the services of Ramiah on the ground that he was not fit for any work in the press on account of his ill-health. On 20th June, 1957, the management served almost identical notices on Ponnuswami and Subramanian terminating their services with effect from 21st June, 1957. The ground on which their services were terminated was that the functions of a proof-reader as defined by the Wage Board could be exercised only by a person who was adequately qualified, that the said two persons did not possess the required qualifications for a proof-reader and, therefore, their services were unnecessary and superfluous.

At their request the case of the three persons whose services had been terminated, namely, Ponnuswami, Subramanian and Ramiah was taken up by the Madras Union of Journalists. There were conciliation proceedings but they failed. On the report of the Labour Officer, Madurai, that all efforts at settlement had failed the Government passed an order, G.O. Ms. No. 2924 (Department of Industries, Labour and Co-operation) dated 4th September, 1957, referring the matter for adjudication by the Labour Court at Madurai. The material portion of this order is as follows:—

"Whereas the Government are of opinion that an industrial dispute has arisen between the workers and the management of 'Tamil Nadu', Madurai, in respect of matters mentioned in the annexure to this order ;

and whereas, in the opinion of the Governor of Madras, it is necessary to refer the said dispute for adjudication".

The matters referred to adjudication were :—

" (1) Whether the discharge of Ponnuswami and Subramanian, proof-readers, is justified and to what relief they are entitled?

(2) Whether the transfer of Ramiah to Visalakshi Achagam and his subsequent discharge are justified and to what relief he is entitled?"

Before the Labour Court, Madurai, the General Secretary of the Madras Union of Journalists on behalf of the Working Journalists of 'Tamil Nadu' filed a statement. The said Union is a trade union registered under the Indian Trade Unions Act. Majority of the working journalists employed in the 'Tamil Nadu' are members of this union. The management filed their counter-statement. On 12th February, 1958, the Labour Court passed an award ordering reinstatement of Ponnuswami, Subramanian and Ramiah as proof-readers in 'Tamil Nadu' with back wages to them from the dates of notices issued to them terminating their services respectively.

The Labour Court framed the following issues on the contentions of the parties :

(1) Whether the dispute is an individual one or an industrial one ?

(2) Whether the discharge of Ponnuswami and Subramanian, proof-readers, is justified and to what relief they are entitled ?

(3) Whether the transfer of Ramiah to Visalakshi Achagam and his subsequent discharge are justified and to what relief he is entitled ?

(4) Whether Ponnuswami, Subramanian and Ramiah are proof-readers within the meaning of Act XLV of 1955, Central. ?

On Issue 1 the Labour Court held that the dispute was clearly an industrial dispute. On Issue 4, he held that the three individuals were proof-readers within the meaning of Act XLV of 1955. On Issue 2 he found that the discharge of Ponnuswami and Subramanian was not justified and that they were entitled to be reinstated with back wages and on Issue 3 he held that the transfer of Ramiah to Visalakshi Achagam from 'Tamil Nadu' was not *bona fide* and he was, therefore entitled to be reinstated as proof-reader in the 'Tamil Nadu' as and from the date of the order terminating his services. It is clear to us from the judgment of the Labour Court that in the opinion of the Court the termination of services of Ponnuswami and Subramanian and the transfer of Ramiah to Visalakshi Achagam were really with a view to deprive them from getting the benefits of the decision of the Wage Board and not *bona fide*. The management of 'Tamil Nadu' thereupon filed a writ petition, W. P. No. 184 of 1958 to quash the order of the Labour Court. Balakrishna Ayyar, J., allowed the writ petition, that is to say, quashed the order of the Labour Court. The learned Judge held that the order of the Government referring the dispute for adjudication to the Labour Court was wrong and did not confer any jurisdiction on the Labour Court to decide matters dealt with by him in his order. He further held that an employer is entitled to terminate the services of any of his employees on giving him the customary notice or wages in lieu of notice and that the management of 'Tamil Nadu' was entitled to terminate the services of any particular employee and replace him by another, and the Labour Court could not order reinstatement of the aforesaid three persons.

At the outset it is important to notice that objection as to jurisdiction of the Labour Court to adjudicate on the disputes referred to it on the ground that there was a mistake in the reference was not raised by the management. The only objection taken was that there was no industrial dispute. This is covered by Issue 1. The learned Judge has held that as the order of the Government refers to a dispute between the Workers of 'Tamil Nadu' on the one hand and the management of 'Tamil Nadu' on the other, the dispute between the Working Journalists of 'Tamil Nadu' and the management of 'Tamil Nadu' cannot be adjudicated upon. It is quite clear to us on an examination of the papers leading up to the order of reference that what the Government intended to and did refer to the Labour Court was the dispute between the Working Journalists and the management of 'Tamil Nadu'. The order was passed on the report of the Conciliation Officer that the matter could not be amicably settled. The conciliation proceedings related only to the dispute between the Working Journalists and the management of 'Tamil Nadu'. To us it appears that the use of the word 'Worker' instead of 'Working Journalists' is an in-

advertent mistake which does not in any way affect the substance of the matter. The subsequent conduct of the management also shows that they were only concerned with the dispute between them and the Working Journalists. In the award of the Labour Court the parties are described as Working Journalists of "Tamil Nadu" respresented by the Madras Union of Journalists. The claim statement before the Labour Court was filed by the General Secretary of the Madras Union of Journalists on behalf of the Working Journalists of "Tamil Nadu". In the counter-statement filed on behalf of the management there is no trace of any objection now raised, namely, that the reference of the dispute was only between the workers of "Tamil Nadu" and its management. If this objection had been taken in the forefront at the earliest opportunity it would have been quite easy for the Government to have rectified the mistake. Not having taken this objection and taking part in the proceedings before the Labour Court, it appears to us quite unfair on the part of the management now to turn round and contend that the entire reference is bad. We are also convinced that the management has suffered no prejudice on account of this mistake. It is not as if they were misled by the reference into thinking that they had to meet a dispute between them and the workers and not with the Working Journalists. All that the management could say treating the matter as a dispute between the Working Journalists and themselves was said and all material evidence adduced. This Court is not bound to interfere in a case like this when it is convinced that no injury has been sustained by the party complaining of the mistake. The learned Judge Balakrishna Ayyar, J., gave as an analogous instance the case of a Second Class Magistrate trying and convicting a person of murder. The learned Judge pointed out that the conviction would be void even though the Magistrate might have heard and considered evidence fully, fairly and carefully. With great respect to the learned Judge, we think that it is not an apposite analogy. The Second Clsss Magistrate has no jurisdiction whatever to try a case of murder but the Labour Court at Madurai has jurisdiction to decide a dispute between the Working Journalists and the management. This is certainly not a case as if the Labour Court at Madurai could not have heard and decided the questions referred to it if in the reference instead of the workers the term Working Journalists had been mentioned. We are unable to agree with the learned Judge that the order of the Labour Court is liable to be quashed on the ground that the reference mentioned the dispute as dispute between the Workers and the management of "Tamil Nadu", and not as a dispute between the Working Journalists and the management of "Tamil Nadu".

The next objection to the jurisdiction of the Labour Court was based upon an entry in Schedule II of the Industrial Disputes Act, namely, Entry 3 which runs as follows:

> "Discharge or dismisssal of workmen including reinstatement of or grant of relief to, workmen wrongfully dismissed."

The contention was that as this item does not specifically refer to reinstatement of workmen wrongfully discharged or workmen whose services have been wrongfully terminated, the Labour Court had no jurisdiction to include in his award an order of reinstatement of the three persons whose services had been terminated. We do not find any trace of this objection either in the counter-statement filed on behalf of the management. In any event we do not see any substance in this contention. The Second Schedule was not in the Industrial Disputes Act as it originally stood. It was inserted by Act XXXVI of 1956 which amended the Act. The Second and the Third Schedules became necessary on account of the new provisions introduced by the said Act of 1956 constituting two classes of Tribunals for the adjudication of industrial disputes, namely, Labour Courts and Industrial Tribunals. In addition to these two there was also provision for the constitution of National Industrial Tribunals with which we are not now concerned. Under section 7 (1) of the Industrial Disputes Act, 1947, as amended by the Act of 1956, Labour Courts were constituted for the adjudication of industrial disputes relating to any of the matters specified in the Second Schedule and for performing such other functions as may be assigned to them under the Act. Under section 7-A the Industrial Tribunals were invested with power to deal with industrial disputes relating to any matter whether specified

in the Second or the Third Schedule. The Second Schedule after enumerating certain matters, items 1 to 5, contains as the final item the following :

> " All matters other than those specified in the Third Schedule."

It was not contended and it cannot be that the matter relating to wrongful termination of workmen is one of the matters specified in the Third Schedule. It follows that this is a matter which could fall within item 6 even if it did not fall within items 1 to 5. There is nothing in the Act which expressly provides for the reliefs which may be granted by the Labour Court or the Industrial Tribunal. The Second and the Third Schedules cannot certainly be construed as defining the powers of the Labour Courts and Industrial Tribunals to the grant of particular reliefs. A perusal of the items makes it clear that what the Second and the Third Schedules were concerned with is a division of the functions between the two sets of Tribunals, namely, the Labour Courts and the Industrial Tribunals. Item 3 of Schedule II cannot obviously be construed literally which mentioned as a matter within the jurisdiction of the Labour Court the discharge of workmen but which does not mention the grant of any relief to workmen wrongfully discharged. If the contention on behalf of the management were to be accepted the result is that when the Labour Court will have jurisdiction to decide a dispute as regards the discharge of workmen, and it would be open to the Labour Court to hold that certain workmen were wrongfully discharged, no relief can be granted to them by the award which must be submitted by the Labour Court. In our opinion if a dispute as regards the termination of a workman is a matter falling within the jurisdiction of the Labour Court, there is no restriction in the Act as to the relief which could be granted to the workmen, if the Labour Court finds that the termination was wrongful.

There remains another question whether an employer is entitled to terminate the services of any employee on giving him the customary notice or wages in lieu of notice in the exercise of a common law right which is involved in the relationship of the employer and the employee. The learned Judge held that there was nothing in the Industrial Disputes Act or in the Working Journalists Act which took away the power of an employer to terminate the services of an employee by giving him reasonable notice. The learned Judge proceeded on the assumption that the services of Ponnuswami and Subramanian were terminated because the management wanted to replace them by others who would in their judgment be more suitable for the work.

It is now well established that the regulation of the relation between the industrial managements and their employees or workmen falls outside the realm of contract. As was pointed out in *Sree Meenakshi Mills, Ltd.* v. *State of Madras*[1].

> "Many if not all, of the so-called disputes between employers and employees in industrial concerns are not founded on contractual rights and obbigations, but on considerations outside strict legal rights and obligations. . . . . The essential object of all recent labour legislation has been not so much to lay down categorically the mutual rights and liabilities of employer and employees as to provide recourse to a given form of procedure for the settlement of disputes in the interests of the maintenance of peaceful relation between the parties without apparent conflicts such as are likely to interrupt production and entail other dangers."

In that decision reference was made to the following observations of the Privy Council in *Labour Relations Board of Saskatchewan* v. *John East Iron Works, Ltd.*[2]:

> " The jurisdiction of the Board (Labour Relations Board). . . . . . is not invoked by the employee for the enforcement of his contractual rights ; those, whatever they may be, he can assert elsewhere. But his reinstatement which the terms of his contract of employment might not by themselves, justify, is the means by which labour practices regarded as unfair are frustrated and the policy of collective bargaining as a road to industrial peace is secured. It is in the light of this new conception of industrial relations that the question to be determined by the Board must be viewed."

The Federal Court, the Supreme Court and this Court have always approached questions relating to disputes between the employers and the employees under the

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1. (1951) 2 M.L.J. 382 at 388.
2. A.I.R. 1949 P.C. 129 : 53 C.W.N. 389 (P.C.).

Industrial Disputes Act not from the standpoint of contractual rights and obligations but from the standpoint based on policy to be followed to secure harmonious relations between the employers and the workers. In *Rohtas Industries, Ltd.* v. *Brijnandan*[1], the Supreme Court observed as follows :

" A Court of law proceeds on the footing that no power exists in the Courts to make contracts for people; and the parties must make their own contracts. The Courts reach their limit of power when they enforce contracts which the parties have made. An Industrial Tribunal is not so fettered and may create new obligations or modify contracts in the interests of industrial peace, to protect legitimate trade union activities and to prevent unfair practice or victimisation."

In our view it is open to the labour Court to find whether the termination of the services of a particular workman was *bona fide* or was *mala fide*, that is to say, actuated by any motive which cannot be justified. The Labour Court has found in this case that the action of the management in terminating the services of Ponnuswami and Subramanian and in transfering Ramiah to Visalakshi Achagam within a few days of the Wage Board 's decision was with the intention of depriving them of the benefit of the Wage Board's decision. The Labour Court accepted the testimony of one of the discharged workmen Ponnuswami that he was asked to resign his job and join as a clerk but do the proof-reader's work. His finding is also based on several admissions made by the witnesses examined for the management that the three proof-readers concerned in this appeal were retained in service after conducting repeated tests as to their efficiency.

On this finding the Labour Court was quite justified in acting within its jurisdiction and directing reinstatement of the three workers. It is too late in the day to contend that reinstatement is not one of the reliefs which can be granted on an adjudication of an industrial dispute which relates to wrongful dismissal or discharge or termination of the services of a worker. The decision of the Federal Court in *Western India Automobile Association* v. *Industrial Tribunal, Bombay*[2], is direct authority that reinstatement is a relief which can be granted by an Industrial Tribunal functioning under the Industrial Disputes Act. There are also other decisions of the Supreme Court which have proceeded on this basis. If anything to the contrary was intended to be laid down in *Radha Raman Bajpal and others* v. *Labour Appellate Tribunal of India*[3] and *A. R. Bhosle* v. *Nagpore Syndicate Motor Union*[4], it cannot be sound law.

Mr. Tygarajan, learned counsel for the management contended that the contractual and other rights under the common law as between the employer and the employee are subject only to specific provisions curtailing or restricting such rights contained in labour legislations. He referred us to the Industrial Employment (Standing Orders) Act, 1946 and contended that once the obligations laid on the management by the provisions of this Act were not transgressed the workmen cannot complain against any action of the management. That Act provides for standing orders by which the industrial establishments intended to define the conditions of employment. Matters to be covered by such standing orders are contained in the Schedule which includes several items such as classification of workmen, shift working, conditions of procedure in applying for leave, suspension or dismissal for misconduct, etc. One of the items is "termination of employment and the notice thereof to be given by employer and workmen." One contention on behalf of the management was, and this contention appears to have found favour with Balakrishna Ayyar, J., that this item implies that if notice in accordance with the standing orders is given by an employer, no termination of employment can be questioned. While it is clear that termination of employment without a proper notice would be *ipso facto* bad it does not follow that a termination of employment even after the prescribed notice cannot be impugned on the ground that such termination though ostensibly conforming to the standing orders was actuated by improper motives. We are unable to hold that the power of a Labour Court or Industrial Tribunal under the Industrial Disputes Act is in any way affected by the provisions of the Industrial

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1. (1956) S.C.J. 740 : A.I.R. 1957 S.C. 1 at 6.
2. (1949) F.L.J. 154 : 1949 F.C.R. 321 : I.L.R. (1949) Bom. 686 : A.I.R. 1949 F.C. 111.
3. (1957) 2 L.L.J. 15.
4. (1959) 1 L.L.J. 114.

Employment (Standing Orders)Act, 1946 or standing orders maintained for industrial establishments in accordance with the Act. Mr. Tyagarajan, attempted to justify the action of the management on the ground that their action became necessary on account of the definition of the functions of a proof-reader by the Wage Board. We see nothing in this definition which is so revolutionary in character that it required terminating the services of employees who had been performing their duties as proof-readers efficiently. The functions of a proof-reader mentioned in the definition of the Wage Board the functions generally understood to be the functions of a proof-reader. Much was made of the fact that in the definition of the functions there was reference to factual discrepancies, slips of spelling grammar and syntax which may also have to be discovered by the proof-reader and either correcting them or getting them corrected. It is important to notice that there is no obligation on the part of a proof-reader to discover such mistakes. Indeed certain editors may not appreciate such discovery to be brought home to them. Of course, obvious spelling and other mistakes are always expected to be corrected by the proof-reader but it is not suggested that the three proof-readers concerned in this appeal were not qualified to make such corrections. In any event this justification of their action by the management cannot prevail in view of the finding of the Labour Court that the real reason for the termination of the services of the aforesaid three persons was to prevent them from getting the benefit of enhanced wages prescribed by the Wage Board.

Mr. Tyagarajan is right in contending that the termination of the services of Ramiah by Visalakshi Achagam is not a subject-matter which can fall within the scope of the reference. The dispute is only between the Working Journalists and the Management of "Tamil Nadu" and we are not concerned with any action that might have been taken by the Visalakshi Achagam but the Labour Court has only dealt with the transfer of Ramiah to Visalakshi Achagam and has held that such transfer was not done in the usual course of administration but to prevent him from getting the benefit of the Wage Board decision. The award of the Labour Court is not vitiated on this account.

In the view we have taken of the action of the management as regards the aforesaid three persons it is not necessary for us to discuss the question whether the management of an industrial concern can terminate the services of any of its workmen merely on the ground that other workmen with superior qualifications may be employed. It may be, the management will be entitled to terminate the services of inefficient workmen, *i.e*, workmen who are not able to do their duties properly. But we doubt if the management can terminate the services of a workman, because another with better qualification is available. It is not necessary for us to decide the question finally in this case.

The appeal is allowed and the order of Balakrishna Ayyar, J., quashing the award of the Labour Court is hereby set aside and the writ petition filed by the first respondent that is the Management of "Tamil Nadu", Madurai, is dismissed. There will be no order as to costs.

V.S. ——— *Writ appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI AND MR. JUSTICE SUBRAHMANYAM.

K. Hutchi Gowder .. *Appellant**

v.

H. Bheema Gowder .. *Respondent.*

Registration Act (XVI of 1908), *section* 49, *Proviso—Scope—Unregistered deed—Admissibility in evidence—Deed uneffective due to non-registration—If can be read as an agreement to execute such document.*

Specific performance—Suit by the vendee to get the document executed and registered by the vendor—Circumstances under which right can be claimed.

Deed of release—When effective to transfer title.

* Appeal No. 252 of 1955.

6th January, 1959.
(16th Pansa, 1880, Saka.)

The plaintiff and the defendant entered into an agreement on 13th September, 1946, as regards the sale of certain property. The agreement contained a clause that on payment of the balance of consideration on or before 10th October, 1946, the vendor will execute and register a proper and valid conveyance. In July, 1949, the plaintiff-vendee and the defendant-vendor agreed that in the place of the conveyance he would execute a release deed. On 30th October, 1949, the vendor executed a release deed but he defaulted in getting the deed registered. The release deed contained a clause "the releasor hereby assures and declares that, whenever called upon by the releasee the releasor will do sign and execute the deeds and writings for better securing the estate." The vendee filed a suit on 30th October, 1952, praying for a decree directing the vendor to execute and register a deed of release or in the alternative an instrument of conveyance.

The first part of the proviso to section 49 of the Registration Act effected a change in the pre-existing law to this extent, namely, (1) it placed it beyond doubt that an unregistered instrument, which, by reason of non-registration, is inoperative to affect immovable property, may be tendered in evidence to prove the agreement in pursuance of which the instrument was executed and (2) where an unregistered instrument contains a contract to execute a fresh document, the unregistered instrument may be tendered in evidence to prove the contract.

The words 'may be received as evidence of a contract' occurring in the proviso mean 'may be received in evidence to prove a contract'. Those words do not mean 'may itself be read as a contract to execute a document in future.'

The proposition laid down in *Venkatasami* v. *Krishnayya,* (1893) 3 M.L.J. 169: I.L.R. 16 Mad. 341, namely, that a deed of transfer, which by reason of non-registration is inoperative to affect the immovable property comprised therein cannot be read as an agreement to execute a deed of transfer in future continues to be a correct statement of the law on that point and its validity has not been affected by the enactment of the proviso to section 49 of the Act.

On a question of construction it does not seem reasonable to say that a deed of transfer should, if registered, be read as a deed of transfer and should, if unregistered, be read as an agreement to execute a deed of transfer in the future.

It cannot be said that in no case can a defendant, who has executed a document, which becomes inoperative for want of registration, be called upon to execute a fresh document.

The right of a plaintiff who has an unregistered (and therefore inoperative) deed of transfer in his possession, to call for the execution of a fresh document fall under two classes. The first class of cases are those in which the plaintiff presented the document for compulsory registration and having failed to have the document registered instituted a suit for specific performance of the agreement to execute a deed of transfer. The second class of cases are those in which the plaintiff instituted a suit for specific performance, without having presented for registration the document which had been executed.

In first of these two cases if the application for registration is refused by the registration authorities, his suit for specific performance would not be maintainable unless he had instituted a suit under section 77 of the Act and had failed in obtaining a decree for registration. If he had instituted a suit under section 77 and failed, his suit for the execution of a fresh deed of transfer may be decreed in his favour if it is found that the refusal to register the first document was on grounds which could not disentitle him to the equitable remedy of specific relief.

In the second of the cases above referred to a plaintiff who, having obtained a deed of transfer which requires registration in order that it may become operative, institutes a suit for a decree directing defendant to execute a fresh deed of transfer, without having presented for registration the deed which had been executed, cannot obtain a decree in such a suit unless the plaintiff proves that the failure to have the deed registered was not due to any wrongful act or negligence on his part.

The language used in the unregistered release deed applies partly to the agreement made in 1946 and partly to the agreement made in July, 1949. In such circumstances, under section 97 of the Evidence Act evidence may be given to show that the liability to execute the release deed acknowledged by the release deed was the liability undertaken under the agreement of July, 1949, although that agreement was not specifically referred to in the release. The liability acknowledged under the release was not discharged by the mere execution of the deed since it was not registered. The acknowledgment of liability contained in the release will save limitation for enforcing the agreement of July, 1949.

In enforcement of the promise made by the defendant in the release deed to sign and execute all deeds and writings for better securing the estate, the plaintiff is entitled to have a proper deed of conveyance executed by the defendant at the plaintiff's cost and registered.

A release deed can only feed title but cannot transfer title. If two persons claim title to the same property adversely to each other a release deed by the one to the other may be effective to complete or place beyond doubt the latter's title to the property.

Case-law discussed.

Venkatasami v. *Krishnayya,* (1893) 3 M.L.J. 169 : I.L.R. 16 M. 341, considered.

Appeal against the Decree of the Court of the Subordinate Judge of Nilgiris, at Ottacamund, dated 31st December, 1954 and passed in O.S. No. 226 of 1952.

M. K. Nambiyar, K. K. Venugopal and *C. F. Louis,* for Appellant.

V. Tyagarajan and *T. K. Subba Rao,* for Respondent.

The Judgment of the Court was delivered by

Subrahmanyam, J.—The plaintiff appeals from the judgment of the learned Subordinate Judge, Ottacamund, dated 31st December, 1954, in O.S. No. 226 of 1952, on his file. The plaintiff prayed for a decree directing the defendant to execute and register a deed of release or, in the alternative, an instrument of conveyance in respect of the defendant's undivided 1/6th share in the property known as Wakefield Estate, Nilgiris. The Subordinate Judge dismissed the plaintiff's suit. Hence the appeal.

On 13th September, 1946, the plaintiff-defendant and four others entered into the agreement Exhibit A-1. The document states that each of those six persons owned an undivided 1/6th share in the Wakefield Estate. The defendant and the four others agreed under that document to sell each his undivided 1/6th share in the estate to the plaintiff in consideration of his paying to each of them Rs. 10,000. Rs. 1,000 was paid on the date of the agreement. Paragraph 3 of the agreement states :

" The purchaser will pay the balance of the purchase money, *viz.*, Rs. Nine Thousand only to each of the vendors on or before the 10th day of October, 1946 and on payment of the balance of the purchase money, each of the vendors will execute and register in favour of the purchaser or his nominee a proper and valid conveyance of their sixth undivided share in the aforesaid premises known as the Wakefield Estate subject to the liabilities hereinbefore mentioned and deliver possession of their share to the purchaser. The costs of stamp on the conveyance and registration charges and purchaser's Solicitors fees will be borne by the purchaser. And the purchaser will pay and discharge the liability under the mortgage indenture and under the aforesaid promissory note for Rs. Fifty-nine thousand only and all other liabilities payable in respect of the said Wakefield Estate."

The promissory note referred to in that paragraph is the note, which had been executed by all the six persons in favour of one Ricobthas Fathaimull & Company for Rs. Fifty-nine thousand. Paragraph 5 of the agreement is in these terms :

" If the vendors should fail to execute and register the conveyance when called upon, purchaser will be either entitled to claim the refund of the deposit of Rs. One Thousand only from each of the vendors with interest at nine per cent. per annum from date of payment till date of repayment or to specifically enforce the agreement against the vendors".

The balance of Rs. 9,000 payable out of the price to each of the five vendors named in Exhibit A-1 was duly paid by the plaintiff on 10th October, 1946. Exhibit A-6 is the receipt granted by the defendant acknowledging receipt of Rs. 9,000.

The defendant and the four other vendors did not immediately execute a sale deed in favour of the plaintiff but sent to him the letter Exhibit B-3, which is in these terms :

" We shall execute the conveyance in respect of our one-fifth share within thirty days from this date as soon as you have arranged to release us from our liability to Messrs. RicobthasFathaimull & Co. under the promissory note, dated 15th August, 1946, as you obtained back the receipts issued by us six persons to 19 persons for Rs. 9,500 each".

The letter was signed by the defendant and three others on 10th October, 1946, and by the fifth vendor on 16th October, 1946.

The plaintiff alleged in the plaint that in July, 1949, he and the vendors (defendant and the four others) agreed that, in the place of a deed of conveyance, each of the vendors would execute a deed of release, and that, in pursuance of that oral agreement, three of the vendors had executed release deeds and had had them duly registered and that the fourth vendor being dead his legal representatives had agreed to execute and get registered a deed of release. In regard to the defendant, the plaintiff alleged that he had executed a release deed Exhibit A-2 in favour of the plaintiff on 30th October, 1949. The release was, however, not registered. The plaintiff alleged that the defendant had failed to register the release deed executed by him and contended :

"The plaintiff is entitled to enforce the agreement, dated 13th September, 1946, as subsequently modified between the parties by compelling the defendant to execute and register a proper release deed or at least to execute and register a proper conveyance in favour of the plaintiff".

On those allegations, the plaintiff prayed for a decree directing the defendant to execute and register a proper release deed or, in the alternative, a proper conveyance of the defendant's 1/6th share in the Wakefield Estate.

The defendant admitted execution of the agreement, dated 13th September, 1946 and receipt of Rs. 10,000 the price payable to the defendant for his 1/6th share of the Estate. The defendant pleaded however that the plaintiff had not discharged the liabilities which, under paragraph 3 of the agreement, dated 13th September, 1946, he was bound to discharge, that that the defendant was not bound to execute any conveyance or release deed until those liabilities were discharged. The defendant denied that he had agreed in July, 1949, that he would execute a release deed instead of a sale deed. In regard to the release deed Exhibit A-2, the defendant pleaded that the date and month of the release deed filed in Court had been tampered with. He did not deny the genuineness of his signature found in that document. He pleaded that the suit to enforce the agreement of 1946 was barred by limitation. In regard to the alleged agreement to execute a release deed, the defendant pleaded that, even if true, the agreement had been performed by the execution of the release deed filed in Court and that the plaintiff was not entitled to ask for the execution of a fresh release deed. The defendant pleaded further that the agreement alleged to have been entered into in July, 1949, had, even if true, been superseded by the agreement executed by the plaintiff, on 29th November, 1949.

The release deed, dated 30th October, 1949, contains a clause :

> "the releasor hereby assures and declares that whenever called upon by the releasee, the releasor will do sign and execute deeds and writings for better securing the estate at the cost of the releasee in manner aforesaid".

During trial, a contention was raised in the lower Court on behalf of the plaintiff that, on that clause, the plaintiff was entitled to call upon the defendant to execute a deed of conveyance. The defendant demurred.

The learned Subordinate Judge found that the agreement on the part of the plaintiff to discharge the liabilities mentioned in paragraph 3 of the agreement, dated 13th September, 1946, was not a condition precedent to the performance by the defendant of his obligation to execute a deed of conveyance ; that the agreement to execute a deed of conveyance had been modified in July, 1949, by an agreement to have a deed of release executed in the place of a deed of conveyance or sale ; that the release deed Exhibit A-2 was in fact executed by the defendant on 30th October, 1949, the date it bore, in performance of the agreement which had been entered into in July, 1949, to execute a deed of release in place of a deed of sale and that the agreement to execute a deed of conveyance or deed of sale had not been superseded by the agreement, dated 29th November, 1949. The learned Subordinate Judge held further tha, the suit, in so far as it sought to enforce the agreement of September, 1946, was barred by limitation, that the agreeement of July, 1949, to execute a deed of release in the place of a deed of sale having been performed by the execution of Exhibit A-2, (the deed of release, dated 30th October, 1949), the agreement was not outstanding any longer for performance ; that the plaintiff having failed to present the document for compulsory registration and get it registered was not entitled to ask for the execution of a fresh deed of release and that the clause in the release deed that the defendant would, whenever called upon, sign and execute all deeds for better securing the Estate did not entitle the plaintiff to call on the defendant to execute a deed of conveyance. On those findings, the learned Subordinate Judge dismissed the plaintiff's suit.

The first question for decision is whether, under the terms of the agreement, Exhibit A-1, the plaintiff was bound to discharge the liability under the mortgage and the promissory note and other liabilities payable in respect of the estate (referred to in paragraph 3 of the agreement) before the plaintiff could call upon the defendant or any of the other four vendors to execute a conveyance, in respect of his undivided 1/6th share in the Estate. In paragraph 3 of the agreement, the plaintiff's right to obtain a sale-deed is linked to his obligation to pay the price on or before

10th October, 1946. His obligation to discharge the mortgage promissory note and other liabilities is an independent obligation, which would give rise to a claim for damages in the event of the plaintiff not discharging those liabilities and the vendors or any of them being damnified thereby. Clause 3 of Exhibit A-1 says that, on the price being paid the vendors will execute and register in favour of the purchaser or his nominee a proper and valid conveyance ". Clause 5 of Exhibit A-1 says :

" If the vendors should fail to execute and register the conveyance when called upon, the purchaser will be....entitled......to specifically enforce the agreement against the vendors."

The effect of these two clauses is that, on paying the price, the plaintiff would become entitled to call on the defendant to execute a sale-deed and, if the defendant failed to execute a sale-deed, when called upon, the plaintiff would become entitled specifically to enforce the agreement and obtain a sale-deed. The plainitff's right to sue for specific performance would accrue on the defendant's failure, after receipt of the price, to execute a sale-deed on being called upon to do so. Agreeing with the learned Subordinate Judge, we hold that the discharge of the mortgage and the promissory note and the other liabilities referred to in the last sentence of clause 3 of Exhibit A-1 was not integrally connected with the plaintiff's right to ask for a sale-deed or the defendant's liability to execute and register a sale-deed. The defendant's liability to execute and register a sale-deed arose as soon as, after payment of the price, the plaintiff called upon the defendant to execute a sale-deed.

After receiving on 10th October, 1946, the entire balance of the price payable under the agreement Exhibit A-1, the defendant wrote to the plaintiff the letter Exhibit B-3 in which he said that he would execute the conveyance in respect of his 1/6th share " within thirty days from this date as soon as you have arranged to release us from our liability to Messrs. Ricobthas Fathaimull & Co." The defendant (D.W. 2) does not say that, subsequent to the execution of the agreement Exhibit A-1, the plaintiff entered into a fresh agreement by which he bound himself not to ask for a sale-deed until the liabilities referred to in the last sentence of paragraph 3 of the agreement had been discharged by the plaintiff. Exhibit B-3 cannot therefore be read as proving a subsequent agreement between the plaintiff and the defendant in regard to the conditions to be fulfilled before the plaintiff could call upon the defendant to execute a sale-deed. Exhibit B-3 appears to have been sent by the defendant in the belief that, under the agreement Exhibit A-1, the plaintiff was not entitled to call for a sale-deed until he had discharged the debt due on the promissory note in favour of Messrs. Ricobthas Fathaimull & Co. That belief was unfounded. Therefore, the fact that the defendant wrote on 10th October, 1946, that he would execute a sale only after the promissory note had been discharged cannot affect the plaintiff's right under Exhibit A-1 to demand a sale-deed as soon as he had paid the price.

The next question for determination is whether the plaintiff and the defendant agreed in July, 1949, that, in the place of a conveyance, which under Exhibit A-1 the defendant had promised to execute, the defendant would execute a deed of release. A deed of release was actually executed by the defendant in favour of the plaintiff.

The reason why a deed of release was executed instead of a conveyance is that one Sivarama Iyer, who had been a Revenue Inspector and who was a document writer, advised the parties that a release deed would be less expensive than a conveyance but would be equally effective and the parties accepted his advice. According to P.Ws. 1 and 2, Sivarama Iyer, gave that advice and all the five vendors including the defendant accepted the advice and agreed in July, 1949, to execute release deeds. Two of the five vendors executed the release deeds Exhibits A-3 and A-4 in August, 1949. P.W. 2 another of the vendors executed the release deed Exhibit A-5 in November, 1949. The fact that each of the vendors executed a release deed in the place of a conveyance renders the evidence of P.Ws. 1 and 2 probable, namely, that before August, 1949, there had been an agreement between all the vendors on the one hand and the plaintiff on the other that release deeds should be executed in the place of conveyance. The defendant denies that he agreed to execute a release

deed. We accept the evidence of P.Ws. 1 and 2 and hold that the defendant and the four other vendors named in Exhibit A-1 agreed with the plaintiff in July, 1949, on the advice and in the presence of Sivarama Iyer, to execute release deeds in the place of conveyances.

The agreement entered into in July, 1949, that release deeds would be executed modified, only on that point, the agreement Exhibit A-1. In every other respect, Exhibit A-1 remained in full force and effect. After July, 1949, the agreement had to be given effect to with words " deed of release " substituted for the word " conveyance ". Otherwise the rights and liabilities under Exhibit A-1 remained unaffected.

It appears to have been contended in the lower Court though that contention was not repeated at the hearing of the appeal, that the modification that a release deed would be executed in the place of a conveyance could not be given effect to because that was a modification in a written agreement made by an oral agreement. Proviso 4 to section 92 of the Evidence Act enacts that the existence of any distinct subsequent oral agreement to modify a contract, whose terms have been reduced to writing, may be proved, except in cases in which such contract is by law required to be in writing or has been registered according to the law in force for the time being as to the registration of documents. The agreement Exhibit A-1 being an agreement to convey, though reduced to writing, is not required by law, to be in writing. The agreement was not registered under the Indian Registration Act. The agreement could therefore be validly modified by the oral agreement entered into between the parties in July, 1949.

The next question for decision is whether the defendant executed the release deed Exhibit A-2 on 30th October, 1949. The defendant does not deny his signature to the document. He admits that he read the document before he signed it. In the written statement, the defendant stated " the date and month of the alleged release deed . . . . have been tampered with". He did not specify the month or the date when he executed the document. He suggested to the plaintiff in cross-examination that the month was corrected from September to October. He did not suggest that any alteration in the date (apart from the month) had been made. As D.W. 2, however, the defendant said that he signed Exhibit A-2 in January, 1949. That is also the evidence of his witness D.W. 3. The learned Subordinate Judge thinks that the document had been typed out on 30th January, 1949 and that, since the defendant signed the document on 30th October, 1949, the word "January" was erased and the word " October " substituted. It is not likely that the document was typed out in January, 1949, because the agreement to execute a release deed was entered into only in July, 1949. It is probable that this particular release deed and other release deeds were typed out in July. The probability also is that the space for typing the date and the month were left blank and were filled in at the time of the execution of each of the release deeds by the respective releasors. We accept the evidence of P.Ws. 1 and 2. We do not believe D.W. 2 or D.W. 3. We find that the defendant executed the release deed Exhibit A-2 on the date it bears namely 30th October, 1949.

The release deed Exhibit A-2 has not been registered. The defendant delivered the document to the plaintiff after executing it. We have to fix the responsibility for its non-registration. The plaintiff could of course have presented the document in the office of the appropriate Registrar for registration. In that event, notice would have gone to the defendant. There is no reason to think that he would have denied registration. If he denied registration, there would have been an enquiry and, if registration was eventually refused by the registration authorities, the plaintiff would have had to institute a suit under section 77 of the Registration Act. But the plaintiff did not present the document for registration. We have to consider whether the omission was wilful or due to negligence or whether the omission was due to causes for which the plaintiff cannot justly be held responsible. There is no reason to think that the plaintiff did not want to have the document registered. Therefore, wilful failure to present the document for registration may be ruled out.

The question then is, whether the failure to have the document registered was due to negligence on the part of the plaintiff or due to causes for which he cannot justly be held responsible.

In paragraph 7 of the plaint, the plaintiff alleges that the defendant has failed to register the release deed executed by him. In paragraph 13 of the written statement, the defendant pleads :

" Having failed to get the said release deed compulsorily registered by pursuing the procedure known to law, the plaintiff cannot now file this suit."

Under Exhibit A-1 the defendant promised " to execute and register in favour of the purchaser or his nominee a proper and valid conveyance ". No conveyance would be valid unless it was registered. The defendant undertook the obligation of having the conveyance, which he could execute, duly registered. That obligation would, under the agreement as modified in July, 1949, attach itself to the release deed. That obligation on the part of the defendant to have the conveyance registered was not discharged by handing the document over to the plaintiff. Since the defendant had expressly undertaken the duty of having the document registered, the defendant would, after handing the document over to the plaintiff, have to call upon him to present it for registration or to deliver it back to the defendant for being presented for registration. It is only if the plaintiff declined, on being so called upon, either to present the document for registration or to deliver it to the defendant that the defendant would be relieved of his obligation to have the document registered ; and not otherwise. The defendant does not say that he called on the plaintiff to present the document for registration or deliver the document to him (defendant) for being presented for registration. Therefore, the responsibility for non-registration on the specific promise embodied in Exhibit A-1 is that of the defendant and not that of the plaintiff.

But let us assume that, by taking the document from the defendant, the plaintiff undertook responsibility for getting the document registered. That is to say, let us treat this as an ordinary case, where the vendor agrees to execute a conveyance, without specifically agreeing also to have the conveyance registered. Even in such a case the agreement would not be fully performed until the vendor has done all that he is required to do to have the document duly registered. This is because an agreement to execute a conveyance necessarily implies an agreement to execute a valid conveyance, that is to say, an agreement to have a conveyance executed, and, where it requires registration, to assist in such registration. Let us assume that the case before us is an ordinary case of that kind, where the vendor who has promised to convey immovable property executes a deed of conveyance and places it in the hands of the vendee. The plaintiff says as P.W. 1 that Exhibit P-1 could not be registered as the defendant evaded and did not come when asked to do so. In cross-examination on that point, he says :

" I know that a document has to be registered within four months of its execution. I did not seek compulsorily registration as I thought he would execute another".

The evidence, in other words, is that the plaintiff was requesting the defendant from time to time to go to the Registrar's Office and get the document registered, but that the defendant, on some ground or other, put the plaintiff off and that the plaintiff did not present the document for registration because the plaintiff believed that even if the time allowed for registration got past, the defendant would execute a fresh release deed and have it registered. The plaintiff, if his evidence be true, was willing to allow the defendant to have the document registered at his convenience and believed that, if it was inconvenient for the defendant to have the document registered within the time allowed, the defendant would execute a fresh release deed and get it registered. If that evidence be accepted, it would follow that responsibility for non-registration is on the defendant and not on the plaintiff. The defendant as D.W. 2 says there was no demand to register the document. That is not probable at all. The plaintiff is bound in the usual course to have asked the defendant to go to the Registrar's Office to have thc document registered.

We accept the plaintiff's evidence and find that the document could not be registered as the defendant evaded and did not go to the Sub-Registrar's Office when asked to do so and that the plaintiff did not present the document for registration because he believed in good faith that if the time for registration of that particular document expired, the defendant would execute another release deed and get it registered. We hold that the responsibility for failure to have the document registered is the defendant's and not the plaintiff's.

The next question for decision is whether the agreement to execute a release deed became superseded by Exhibit B-2, the agreement, dated 30th November, 1949. (The date 29th November, 1949 in the defendant's written statement appears to be a mistake for 30th November, 1949). The point was not argued at the hearing of the appeal. It is adequately considered in paragraph 10 of the learned Subordinate Judge's judgment. Exhibit B-2 relates to the discharge by the plaintiff of certain liabilities of the business which had been carried on under the name and style of "Wakefield Tea Estate Company". It has nothing to do with the execution of a release deed by the defendant or the registration of the release deed which had been executed by the defendant on 30th October, 1949, or the performance of the obligations undertaken by the defendant in and by the release deed Exhibit A-2. We find that Exhibit B-2 does not impair the obligations of the defendant under the agreement Exhibit A-1 or under the oral agreement entered into in July, 1949, or under the release deed Exhibit A-2.

The plaintiff prays in the plaint that the defendant be directed to execute and register a proper deed or in the alternative a proper conveyance of the defendant's 1/6th share in the Wakefield Estate. A proper release deed has been executed but it has not been registered. The point for decision is whether the plaintiff is entitled to call on the defendant to execute a fresh release deed. We have found that the defendant agreed in July, 1949, to execute a release deed. But if this suit be regarded as a suit to enforce the agreement of July, 1949, questions of limitation would arise because the suit was instituted only on 30th October, 1952. No such question would arise if the deed of release Exhibit A-2 could itself be read as an agreement to execute a release deed and if the suit may be regarded as a suit to enforce that agreement. The point for decision is whether a sale deed or other instrument relating to immovable property, which for want of registration, is inoperative to affect such property, may be read as an agreement to execute a fresh sale deed or other instrument in the same terms as the unregistered instrument. That question was answered in the negative in *Venkataswami* v. *Krishnayya*[1]. The appellant's learned counsel argues that that answer has been rendered obsolete by the Proviso to section 49 of the Indian Registration Act enacted by the Transfer of Property (Amendment) Supplementary Act (XXI of 1929) which took effect on 1st April, 1930. That argument makes it necessary for us to consider the reasons for the enactment of the Proviso and ascertain the limits of the field of the operation.

The facts in *Venkataswami* v. *Krishnayya*[1], were these. The defendant agreed with the plaintiff to transfer a mortgage deed. In pursuance of that agreement the deed of transfer was executed. It was not registered. The plaintiff instituted the suit, which gave rise to the second appeal, praying for registration of the document or for the execution and registration of a fresh deed of transfer. The trial Court and the lower appellate Court passed a decree that the defendant do execute and register a fresh deed of transfer. In second appeal, Muttuswami Ayyar and Handley, JJ. held that it was out of the question that a decree could be passed directing registration of the deed of transfer which had been executed. The document would have to be presented for registration within the period allowed and, since the period had expired, no decree directing its registration could be passed. The learned Judges had then to consider whether the decree passed by the lower Courts directing the execution of a fresh deed of transfer was correct. On that question, the learned Judges said :

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1. (1893) 3 M.L.J. 169 : I.L.R. 16 Mad. 341.

"The fallacy of the lower Courts consists in treating the document (Exhibit A) as evidencing merely an agreement to transfer the mortgage, whereas it purports to be an operative transfer of the mortgage. If it had been merely an agreement to transfer contemplating a future formal deed of transfer, it would not have required registration, section 17 (*h*). The agreement to transfer the mortgage was so far carried out that the deed of transfer was executed and no suit will lie to compel defendant to do that which he has already done. The only act wanting on his part to complete the contract was to register the deed of transfer, and this act, as we have shown, he could only be compelled to do by the proper proceeding under the Registration Act, followed by suit under section 77, if plaintiff failed to obtain his right by such proceedings."

Two distinct propositions are laid down in the passage quoted above. The first is this. A deed of transfer could not be read as an agreement to execute a deed of transfer. The second proposition is this, *viz.*, that the suit, in so far as it prayed for the execution of a fresh deed of transfer should be regarded as a suit to enforce specific performance of the agreement in pursuance of which the unregistered deed of transfer had been executed and since that agreement had been performed in part by the defendant by executing a deed of transfer, he could not be compelled to perform that part of agreement a second time. After executing the document, the defendant was under an obligation to assist in the registration of the document. That he could do only after the document was presented for registration. Since the plaintiff failed to present the document for registration, the defendant was not at fault at all and the plaintiff could not call upon the defendant to undo the effects of his (plaintiff's) own default.

Let us consider the first proposition, namely, that a deed of sale or of release relating to immovable property, which, for want of registration, is incapable of affecting such property, cannot be read as an agreement to execute a deed of sale or deed of release in future so as to form the foundation for a suit for specific performance. That proposition formulated in *Venkataswami* v. *Krishnayya*[1] was reaffirmed 27 years later in *Thayarammal* v. *Lakshmi Ammal*[2]. The facts in the latter case were that the plaintiff, who had obtained a sale deed from the defendant, failed to get it registered. The failure was due to his own default in the payment of the purchase money. Thereafter he sued for a decree directing the defendant to execute a fresh sale deed and get it registered. The Court held that, since no default was attributable to the defendant and since it had been on the other hand, that it was the fault of the plaintiff in not paying the consideration that led to the document remaining unregistered, the case was within the principle of *Venkataswami* v. *Krishnayya*[1]. The Court re-affirmed the proposition that it was not open to the plaintiff, in regard to a document which had become inoperative by reason of non-registration, to call on the Court to read it as an agreement to sell. An expression of opinion to the contrary made in *Venkata Seetharamayya* v. *Venkataramayya*[3] was pronounced to be an *obiter dictum* and was dissented from.

Dealing with the contention that a sale-deed which had become inoperative for want of registration should be read as agreement to sell, Coutts-Trotter, C.J., said in *Satyanarayana* v. *Chinna Venkatarao*[4].

"I should have thought it a very vicious method of construction to say that a document, which purports to be one thing is to be allowed to be treated, when it is found imperfectly to contain what it purports to be, as a valid document of a different order altogether".

The judgments referred to above were handed down before the introduction by the Transfer of Property (Amendment) Supplementary Act (XXI of 1929) of the existing Proviso to section 49. The section (so far as relevant) as it stood before the Amendment, read

"No document required by section 17....to be registered shall—

(*a*) affect any immovable property comprised therein, or................

(*c*) be received as evidence of any transaction affecting such property, unless it has been registered."

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1. (1893) 3 M.L.J. 169 : I.L.R. 16 Mad. 341.
2. (1920) 39 M.L.J. 781 : I.L.R. 43 Mad. 822.
3. (1912) I.L.R. 37 Mad. 418.
4. (1925) I.L.R. 49 Mad. 302 : 50 M.L.J. 674, 677.

The following proviso was added to the section by the Transfer of Property (Amendment) Supplementary Act:

"Provided that an unregistered document affecting immovable property and required by this Act......to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877......".

It is argued that that proviso has the effect of rendering obsolete earlier decisions which lay down that a sale deed, which, for want of registration, is inoperative to affect the property comprised in it, cannot be read as an agreement to sell the property in future. The proviso itself does not say so. All that the proviso says is that, where a person sues to enforce a contract for the sale of immovable property and tenders in evidence in such suit a document affecting such property, which is required to be registered but is not registered, no order declining to receive such document in evidence may be passed on the mere ground that the document is not registered. Where a person, who has an unregistered sale deed in his possession, sues for specific performance of an agreement to sell the property comprised in such sale deed, what he really seeks is the enforcement of the agreement in pursuance of which the sale deed was executed. In such a case, one of two defences may be taken by the defendant. He may deny the agreement that is pleaded in the plaint by the plaintiff, or, admitting the agreement, the defendant may plead that, in pursuance of the agreement the unregistered sale deed in the possession of the plaintiff has been executed and that the plaintiff is not entitled to demand that, on that point, the agreement be performed a second time. Suppose that the alleged initial agreement to sell the property was oral and that the defendant denies the agreement, then the unregistered sale deed may be used to prove that there was an earlier agreement to sell the property. The proviso to section 49 which took effect on 1st April, 1930, enables the unregistered sale deed in such a case to be tendered in evidence with a view to prove the antecedent agreement to sell. When such antecedent agreement is proved, the question whether, notwithstanding the execution of the unregistered sale deed, the antecedent agreement to sell is outstanding for enforcement would have to be heard independently and decided.

There is one other category of cases in which a definite alteration in the law was effected by the enactment of the proviso. Such alteration was the immediate purpose of the enactment. The law applicable to that category of cases was laid down by the Judicial Committee of the Privy Council in *Skinner* v. *Skinner*[1]. In that case, there was an instrument of transfer which created a present interest in immovable property. The document, in order to be operative to affect the property, had to be registered. But it was not registered. The document, however, contained an agreement that the defendant would execute another document, if called upon by the plaintiff. But that agreement that the defendant would execute another document was a term of the transfer purported to be effected by the document. Their Lordships held that, because the agreement that the vendors would, if so required, execute in future a registered sale deed was one of the terms of the transfer and therefore an integral part of the transfer, the document could not be admitted in evidence to prove that agreement. That particular state of the law was effectively altered by the enactment of the proviso. By reason of the proviso, an agreement to execute a document, which is contained in an instrument of transfer and which forms part of the terms of the transfer, may be proved by admitting the instrument of transfer in evidence, notwithstanding, that the instrument is not registered and is therefore inoperative to affect the immoveable property comprised therein.

The first part of the proviso to section 49, which has been quoted above, effected a change in the pre-existing law to this extent, namely, (1) it placed it beyond doubt that an unregistered instrument, which, by reason of non-registration, is inoperative to affect immovable property, may be tendered in evidence to prove the agreement in pursuance of which the instrument was executed and (2) where an unregistered instrument contains a contract to execute a fresh document, the unregistered instrument may be tendered in evidence to prove the contract. The words "may

1. (1929) 57 M.L.J. 765 : L.R. 56 I.A. 363 : I.L.R. 51 All. 771 (P.C.).

be received as evidence of a contract" occurring in the proviso mean, in our opinion, "may be received in evidence to prove a contract." Those words, namely, "may be received as evidence of a contract" do not, in our opinion, mean "may itself be read as a contract to execute a document in future". The question whether the enactment of the proviso has affected the rule laid down in *Venkataswami* v. *Krishnayya*[1] that a deed of transfer which, for want of registration, is inoperative to affect the property comprised therein, cannot be read as agreement to execute a document in future, was left open in *Manicka Goundan* v. *Elumalai Goundan*[2]. Our answer to that question is in the negative.

On a question of construction it does not seem reasonable to say that a deed of transfer should, if registered, be read as a deed of transfer and should, if unregistered, be read as an agreement to execute a deed of transfer in the future.

The Full Bench decision in *Muruga Mudaliar* v. *Subba Reddiar*[3], relied on by the learned counsel for the appellant does not touch the present question. In that case, there was an agreement of lease which, for want of registration, was inoperative to affect the property comprised in it. The plaintiff sued for damages for breach of the agreement of lease. The question was whether the document was admissible in evidence. It was held that it was. No question arose in that case of the plaintiff's right to read the document as other than it was, namely, as an agreement of lease.

We hold that the proposition laid down in *Venkataswami* v. *Krishnayya*[1], namely that a deed of transfer, which by reason of non-registration, is ineffective to affect the immovable property comprised therein, cannot be read as an agreement to execute a deed of transfer in future, continues to be a correct statement of the law on that point and that its validity has not been affected by the enactment in 1929-1930 of the proviso to section 49 of the Registration Act.

We have now to consider the second proposition laid down in *Venkataswami* v. *Krishnayya*[1], relating to the right of the plaintiff, who has in his possession an unregistered deed of transfer, to call on the defendant to execute a fresh deed of transfer. Where a plaintiff sues for the execution of a fresh document, what he really does is to seek specific performance of the agreement in pursuance of which the document in his possession was executed. The defence is that, since the document has been executed, the plaintiff cannot call on the defendant to perform that part of the agreement a second time. It is obvious that that cannot form a complete defence in all circumstances. The document may be destroyed by fire or may be lost due to causes beyond the control of the plaintiff. In such a case, it has been held that the plaintiff is entitled to have a fresh document executed. (Please see *Nynakka Rowthen* v. *Vavana Mahomed Naina Rowthen*[4]). The defendant or persons interested in him may abstract the document and may make it unavailable to the plaintiff for being presented for registration. In such a case again, the plaintiff would obviously be entitled to call on the defendant to execute a fresh document and get it registered. (Please see *Chinna Krishna Reddi* v. *Doraiswami Reddi*[5]). It cannot therefore be said that in no case can a defendant, who has executed a document which becomes inoperative for want of registration, be called upon to execute a fresh document.

Cases which have dealt with the right of a plaintiff, who has an unregistered (and therefore inoperative) deed of transfer in his possession, to call for the execution of a fresh document fall under two classes. The first class of cases are those in which the plaintiff presented the document for compulsory registration and, having failed to have the document registered, instituted a suit for specific performance of the agreement to execute a deed of transfer. The second class of cases are those in which the plaintiff instituted a suit for specific performance, without having presented for registration the document which had been executed.

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1. (1893) 3 M.L.J. 169 : I.L.R. 16 Mad. 341.
2. (1956) 2 M.L.J. 536.
3. (1950) 2 M.L.J. 818.
4. (1869) 5 M.H.C.R. 123.
5. (1886) I.L.R. 20 Mad. 19.

Satyanarayana v. *Chinna Venkatarao*[1], was a case in which the plaintiff had presented the document for registration. The registration authorities refused registration as against the 3rd defendant. The plaintiff did not institute a suit under section 77 of the Registration Act for a decree directing the document to be registered. Instead the plaintiff instituted a suit for a decree directing the execution of a fresh document and registration of such document. This Court held that the remedy of specific performance was an equitable remedy, which was not available to a person who had been guilty of laches. Coutts-Trotter, C.J., said :

> " How it can be said that a man who was given an express statutory remedy by an Act of legislature under section 77 of the Registration Act and has failed to take advantage of it has not been guilty of laches and is entirely free from blame passes my comprehension. It appears to me that a man who has failed to adopt the remedy expressly provided by the statute cannot come to this Court and ask for an exercise in his favour of discretionary and equitable remedy ".

In that view, the suit was dismissed. That decision was followed in *Venkatasubbayya* v. *Venkatarathnamma*[2].

The question arises, what happens if the plaintiff's suit under section 77 of the Registration Act to compel registration of the document fails. Would he be entitled thereafter to institute a suit for specific performance ? That question is answered in *Manicka Goundan* v. *Elumalai Goundan*[3]. The document considered in that case had been executed by defendants 2 and 3. After its execution, the second defendant had sold the property to the first defendant by a sale deed which they ante-dated. By reason of the execution of that sale deed, the third defendant added at the end of the sale deed executed in favour of the plaintiff, the following sentence : " should any dispute arise in respect of this, it shall not concern us ". The plaintiff presented the document for registration. The second defendant declined to consent to registration on the ground of that unauthorised addition made by the third defendant in the sale deed in favour of the plaintiff. The sale deed was registered as against the third defendant. Registration was refused as against the second defendant. The plaintiff instituted a suit under section 77 of the Registration Act for a decree directing registration. The suit was dismissed. He filed an appeal. During the pendency of the appeal, he filed the suit for specific performance of the agreement to execute a sale deed. The appeal preferred against the decree passed in the suit under section 77 was dismissed. The suit for specific performance was decreed by the District Judge in Appeal. The District Judge directed defendants 1 and 2 to execute a fresh sale deed in favour of the plaintiff in regard to a half of the property. That decree was confirmed in second appeal. There was an appeal under the Letters Patent. The Court held that, since registration was refused against the second defendant because of the alteration made by the third defendant, the first plaintiff could not, by reason of his consenting to the alteration made by the third defendant, be held to be guilty of such conduct as would preclude him from obtaining the relief of specific performance. In that view, the judgment pronounced in second appeal was confirmed.

The position, in law, of a person, who, after presenting a deed of transfer for registration, institutes a suit for a decree directing the execution of a fresh deed of transfer, is this. If his application for registration is refused by the registration authorities, his suit for specific performance would not be maintainable unless he had instituted a suit under section 77 of the Registration Act and had failed in obtaining a decree directing registration. If he had instituted a suit under section 77 and failed, his suit for the execution of a fresh deed of transfer may be decreed in his favour if it is found that the refusal to register the first document was on grounds which could not disentitle him to the equitable remedy of specific relief.

We have now to consider the second class of cases where the plaintiff, having an unregistered (and for that reason inoperative) document in his possession, sues for a decree directing the execution of a second document.

1. (1925) 50 M.L.J. 674 : I.L.R. 49 Mad. 302.
2. (1954) 1 M.L.J. 396.
3. (1956) 2 M.L.J. 536.

Venkataswami v. *Krishnayya*[1], was a case in which the plaintiff sued for the execution of a second document without having presented the first document for registration. The lower Courts found that the defendant was not justified in his refusal to register the document. On that ground, this Court did not allow the defendant-appellant his costs. That decision, if it stood by itself, would seem to make it a rigorous rule of law that a person who had obtained a document but had failed to present it for registration would not, while he continued in possession of the document, be entitled, in any circumstances, to institute a suit for a decree directing the execution of a second document. The rigour of that rule has, however, been modified by subsequent decisions. In *Thayarammal* v. *Lakshmi Ammal*[2], the learned Judges said that, if the failure to have the document registered had been due to act of God or to conduct amounting to fraud on the part of the executant or to any default attributable to him, then, the plaintiff might be entitled to a decree directing the defendant to execute a fresh document. *Valambalachi* v. *Duraiswami Pillai*[3], was a case in which, again, the plaintiff's suit to have a second document was dismissed. The learned Judge, however, made the qualifying observations :

> " I do not wish to be understood to say that there may not be proper cases apart altogether from the provisions of the Registration Act in which a purchaser of property who had accepted a document unregistered will not be entitled to come to Court and ask for specific performance of the contract on the ground that it has not been properly performed. But such a case must be made out on the particular facts."

In *Venkatasubbayya* v. *Venkatarathnamma*[4], the learned Judges, who said that a plaintiff, whose application for registration had been refused by the registration authorities and who had not instituted a suit under section 77 of the Registration Act, could not institute a suit for decree directing the execution of a second document, added by way of *obiter* :

> " It would be a different matter if this unregistered document is sought to be received as evidence of a contract in a suit for specific performance if the party has not set in motion the machinery provided by the Registration Act under sections 72 to 76."

In *Manicka Goundan* v. *Elumalai Goundan*[5], in which this Court affirmed the decree which directed the defendant to execute a fresh sale deed in favour of the plaintiff, who had failed in his suit instituted under section 77 of the Registration Act, the Court said :

> " Taking the case of an agreement to sell, it cannot be said that the contract has been fully performed till there is a properly executed document which is also registered. It cannot be said that the moment a document is executed the contract ceases to be in force. The purchaser is always entitled to insist upon his right to have a proper registered instrument. Every vendor is bound to do all that is necessary to perfect the title of the purchaser, which includes the execution and registration of a proper conveyance. It is true that the purchaser can resort to proceedings under the Registration Act and the special statutory remedy under section 77 of that Act to obtain registration of the executed document. But if for any reason it becomes impossible to obtain registration after resort to such proceedings or because of other circumstances which prevent any resort to such proceedings under the Act, then undoubtedly the vendee is entitled to bring a suit for specific performance of the agreement to sell in his favour. This does not, however, mean that every such suit should be decreed. Being an equitable remedy a Court is not bound to grant specific performance in every case in which an agreement has not been carried out in its entirety. Well established equitable considerations would justify a Court refusing to grant the relief of specific performance. To take an obvious case, if the vendor duly executes a sale deed and hands it over to the vendee and the vendee neglects to present it for registration within the time prescribed and therefore loses his right to have it registered, a Court may well say that the plaintiff has only to blame himself for not securing registration and therefore he would not be entitled to any relief because of his own negligence ".

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1. (1893) 3 M.L.J. 169 : I.L.R. 16 Mad. 341.
2. (1920) 39 M.L.J. 181 : I.L.R. 43 Mad. 822.
3. A.I.R. 1928 Mad. 344.
4. (1954) 1 M.L.J. 396.
5. (1956) 2 M.L.J. 536.

The result of the decisions is that a plaintiff who, having obtained a deed of transfer which requires registration in order that it may become operative, institutes a suit for a decree directing the defendant to execute a fresh deed of transfer, without having presented for registration the deed which had been executed, cannot obtain a decree in such suit unless the plaintiff proves that the failure to have the deed registered was not due to any wrongful act or negligence on his part.

In this case, we have given reasons for the view that the failure to have Exhibit A-2 registered was not due to any wrongful act or negligence on the part of the plaintiff. We have found further that, under the terms of Exhibit A-1, as modified by the oral agreement of July, 1949, it was the defendant's duty not merely to execute a deed of release but also to have it registered and that the defendant has failed to discharge that obligation of having the document registered. We hold that provided that the suit is in time, the plaintiff is entitled to specific performance of the agreement entered into in July to execute and register a deed of rel ease.

The agreement to execute a deed of release was entered into in July, 1949. The suit was instituted on 30th October, 1952. The question is whether the suit is in time. Exhibit A-2 executed on 30th October, 1949, states that it was executed in pursuance of the agreement dated 13th September, 1946, under which the defendant was bound to relinquish his right, title and interest to the plaintiff. Under the agreement, dated 13th September, 1946, however, the defendant became liable to execute a conveyance and not a deed of release. His liability to execute a deed of release arose under the agreement entered into in July, 1949. Therefore, the liability to execute a release deed acknowledged in Exhibit A-2 is a liability which arose under the agreement of July, 1949. The language used in Exhibit A-2 applies partly to the agreement Exhibit A-1 and partly to the agreement of July, 1949. The whole of the language does not apply correctly to the agreement Exhibit A-1. In such circumstances, evidence may be given to show that the liability to execute the release deed acknowledged by Exhibit A-2 was the liability undertaken under the agreement of July, 1949, although that agreement is not specifically referred to in Exhibit A-2 (Please see section 97 of the Evidence Act). The liability acknowledged under Exhibit A-2 was not discharged by the mere execution of the release deed. Exhibit A-2 cannot be regarded as a document discharging the liability until it was registered. It has not been registered. Therefore, the acknowledgment of liability contained in it can be given effct to for the purpose of saving limitation for enforcing the agreement of July, 1949.

We hold that the plaintiff is entitled to a decree directing the defendant to execute release deed.

The plaint contains an alternative prayer that the defendant be directed to execute a conveyance. Under Exhibit A-1, the defendant promised to execute a conveyance. But that promise was superseded by consent by the promise made in July, 1949, that a deed of release would be executed and is not outstanding for enforcement. We hold that the plaintiff is not entitled to ask for the execution of conveyance on the basis of the agreement Exhibit A-1.

The plaintiff's claim to have a conveyance executed is rested in the alternative on the agreement contained in Exhibit A-2. Exhibit A-2 (release deed) states :

> " the releasor hereby assures and declares......that whenever called upon by the releasee the releasor will do sign and execute all deeds and writings for better securing the estate."

The Proviso to section 49 of the Registration Act enables Exhibit A-2 to be received in evidence to prove the agreement. The plaintiff's learned counsel in the lower Court appears unfortunately to have failed to tell the learned Subordinate Judge that a release deed would not be effective to transfer title. A release deed can only feed title but cannot transfer title. If, for example, the plaintiff claims that he has acquired title to the defendant's 1/6th share in the estate by adverse possession and the defendant contests that position, a release deed by the defendant

would be effective to place beyond doubt the fact of the plaintiff having acquired title by adverse possession. If two persons claim title to the same property adversely to each other, a release deed by the one to the other may be effective to complete or place beyond doubt the latter's title to the property. But it is not the case here that the plaintiff and the defendant claimed the undivided 1/6th share in the estate, which is in suit, adversely to each other. Exhibit A-1 proceeds on the basis that the undivided 1/6th share belonged to the defendant to the exclusion of the plaintiff. It is true that the plaintiff himself owned another undivided 1/6th share and that, by transfers effected by the four other persons he became entitled to an undivided 5/6th share. But yet except as purchaser he had no claim to make to the defendant's 1/6th share. Title to that share could hence be acquired only by a proper deed of conveyance or by adverse possession. The plaintiff had not acquired title by adverse possession when he instituted the suit. In order that title to the estate might be secured to him, it was necessary that he should have a proper deed of conveyance. Even if Exhibit A-2 had been registered, the plaintiff would need a deed of conveyance in order to become owner otherwise than by adverse possession. The expression "all deeds and writings for better securing the estate" cannot be limited to deeds or writing which were in the contemplation of the parties at the time of the execution of Exhibit A-2. Any deed or writing, which the plaintiff may subsequently find to be necessary in order to secure title, would, under that clause in Exhibit A-2 have to be executed by the defendant, provided the plaintiffs claim that such further document be executed was reasonable and the plaintiff offered to bear the expenses of the execution and registration of such document. Among the many reservations which Srinivasa Aiyangar, J., made in his exhaustive judgment if I may say so, in *Valambalachi* v. *Duraiswami Pillai*[1], is the following :

"If in a sale or sale deed there should be a covenant for further and better assurance, the right to get a fresh document may conceivably be covered by such a covenant."

That was said before the amendment of section 49 of the Registration Act by the introduction of the proviso. The proviso places the plaintiff's right in that matter beyond the plea of controversy. We hold that, in enforcement of the promise made by the defendant in Exhibit A-2 to sign and execute all deeds and writings for better securing the estate, the plaintiff is entitled to have a proper deed of conveyance executed by the defendant at the plaintiff's cost and registered.

Exhibit A-2 is dated 30th October, 1949. The suit was instituted on 30th October, 1952, the last day of limitation, for enforcing the promise contained in Exhibit A-2. It is alleged that the plaintiff is disentitled, on the ground of laches, to a decree for specific performance. On that question, we adopt with respect the following observations made by Sir Barnes Peacock in *Lindsay Petroleum Company* v. *Hurd.*[2]

"Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has by his conduct does that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material......The situation of the parties having......in no substantial way been altered, either by the delay or by anything done during the interval, there is in these circumstances nothing to give special importance to the defence founded on time."

The appellant, we have found, is entitled to a decree directing the defendant to execute either a deed of release or a deed of conveyance. The appellant's learned counsel requested during arguments that a decree directing the defendant to execute a deed of conveyance might be passed. We hold that a deed of conveyance is necessary in order to secure title to the plaintiff.

We allow the appeal and set aside the judgment and decree of the learned Subordinate Judge. There will be a decree directing the defendant to execute a proper deed of conveyance to the plaintiff of the defendant's undivided 1/6th

1. A.I.R. 1928 Mad. 344.
2. L.R. 5 P.C. App. Cases 221, 239-40.

share in the estate in accordance with the terms of Exhibit A-1. Time for execution, two months from this date. In default, a document will be executed by the Court on behalf of the defendant and will be duly registered. The appellant will have his costs in both Courts.

V.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

N. Saradambal Ammal .. *Petitioner**

v.

The Chief Controlling Revenue Authority, Board of Revenue .. *Respondent.*

Stamp Act (II of 1899), *section* 57 (1)—*Reference to High Court under—If the Revenue Authority could be directed to refer a case by the issue of a writ—Difference between a reference by the Revenue Authority and a reference under directions of High Court.*

Constitution of India (1950), *Article* 226—*Issue of writ under—If could apply to cases under section* 57 (1) *of the Stamp Act.*

It may be that on the terms of section 57 of the Stamp Act the Chief Controlling Revenue Authority would have jurisdiction to refer any matter under that section to the High Court only if it is pending before him. When once the Revenue Authority has decided a matter there would be no right to make a reference to the High Court.

But in cases arising under Article 226 of the Constitution when the assistance of the Court is sought to issue an appropriate writ to direct a reference under section 57 (1) of the Stamp Act the pendency of the case before the Revenue Authority is not of much importance. While the Revenue Authority may not have power to refer a matter under section 57 (1) of the Stamp Act when it is not pending before it the High Court can, under Article 226 of the Constitution, direct the Revenue Authority to refer a case under the section even after Revenue Authority has decided the matter finally.

Nanak Chand v. *Board of Revenue*, A.I.R. 1958 All. 320, differed.

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a Writ of *mandamus* directing the respondent to refer the case relating to order, dated 3rd November, 1956, in B.P. Rt. No. 5409 on his file, to the High Court, Madras, under section 57 (1) of the Indian Stamp Act.

N. K. Mohanrangam Pillai and *N. K. Pattabhiraman*, for the Petitioner.

The Additional Government Pleader (*K. Veeraswami*), for the Respondent.

The Court made the following

ORDER.—This is a petition for the issue of a writ of *mandamus* under Article 226 of the Constitution, directing the Revenue Board, Madras, the Chief Controlling Authority, to refer the case to the High Court under section 57 (1) of the Indian Stamp Act (which will for the sake of convenience be referred to as the Act).

The petitioner, Saradambal Ammal, and two others, namely, Nooruddin Sahib and Natesa Gramani, entered into a tripartite arrangement on 16th February, 1956, under which the properties which I shall refer as *A*, *B* and *C* were exchanged *inter se* so that Saradambal got *C* properties, Nooruddin Sahib *A* properties and Natesa Gramani *B* properties. The document, which is styled as exchange, was stamped as two exchanges under Article 26 of the Indian Stamp Act. It was presented for registration to the Sub-Registrar of Saidapet. That Officer received the document, but, as he felt a doubt about the sufficiency of the stamp, he referred the matter to the Registrar of Assurances, Madras, who was the Collector, within the meaning of the Act. The Registrar of Assurances was of the opinion that the document should

* W.P. No. 214 of 1957. 24th April, 1959. (4th Vaisakha—1881 Saka).

be construed as three conveyances, that an additional duty of Rs. 42 together with penalty of Rs. 5 would be leviable, and that in addition a deficit registration fee of Rs. 5-4-0 should also be collected. In this the Collector was presumably acting under section 40 (1) (*b*) of the Indian Stamp Act. The Sub-Registrar directed the petitioner to pay the deficit stamp duty by his order, dated 3rd April, 1956. The petitioner did not pay the additional stamp duty required of her. She moved the Registrar of Assurances to reconsider the order of the Sub-Registrar, or refer the question to the Collector of Madras. The Registrar of Assurances saw no reason to revise the order of the Sub-Registrar. The petitioner, thereafter, filed a petition before the Chief Controlling Revenue Authority under section 56 of the Stamp Act, praying that the document may be declared to have been properly stamped, and that it may be regarded as two conveyances. In the alternative she prayed that the case might be referred to the High Court under section 57 (1). The Chief Controlling Revenue Authority, the first respondent, by its resolution, dated 3rd November, 1956, held that, the document comprised really three conveyances, and that there was no reason to interfere with the orders of the Registrar of Assurances. It also found that there was no necessity to refer the matter to the High Court, as the stamp duty involved was not much, and as the point involved was not intricate. The petitioner has, thereupon, filed this petition under Article 226 of the Constitution for the relief already mentioned.

Although the Chief Controlling Revenue Authority has stated in its order that the decision as to proper stamp duty payable in respect of the document does not raise any intricate question, it is clear, on a reading of the document, that such a question of law arises in its construction, *viz*., as to whether the document is nothing more than two exchanges, as a result of the tripartite arrangement, or whether it comprises three conveyances. The other reason given by the first respondent, that the amount of stamp duty involved is not much, could hardly be held to be sufficient reason for its refusal to act under section 57 (1).

The ground, on which this petition is resisted on behalf of the respondent, is that in the circumstances of the case there would be no jurisdiction in the respondent to refer the matter to the High Court under section 57 (1) of the Act. It is contended that such a reference can only be of a matter, which is pending before the Revenue Authority and which has to be disposed of after obtaining the opinion of the High Court. It is further contended that, as the matter has been decided in the present case both by the Registrar of Assurances and the Chief Controlling Revenue Authority, there would be no case in respect of which a decision of the High Court is necessary. In support of that contention, the learned Additional Government Pleader relied upon *The reference made under section* 57 *of the Indian Stamp Act.*[1] In that case there was an adjudication by the Collector under section 31 of the Stamp Act as to the duty with which an instrument was chargeable. One of the parties to the document applied to the Board of Revenue for refund of duty, and the question was referred to the High Court. It was held that under section 31 the Collector had determined the duty with which the instrument was chargeable, and as the determination had become final, and there being no case pending to be disposed of by the Revenue Authority, there was no jurisdiction to make a reference under section 57. In the next case, namely, *Reference under Stamp Act, section* 57 (2)[2] this question was more elaborately considered. In that case a Sub-Registrar, acting under section 33, impounded two documents and forwarded the same to the Collector who under section 40 (1) (*a*) certified that they were exempt from stamp duty. At the instance of the Inspector-General of Registration, the Board of Revenue referred the question of proper stamp duty to the High Court under section 57. It was held by a majority of the Judges that the High Court had no jurisdiction to decide the question. The principle of the decision is that the expression "case", in section 57 means a case that has not been already finally and conclusively determined by the Collector or other competent authority, and that unless the Revenue authority has still resting upon it the duty of disposing of a case, it is not intended

1. (1902) I.L.R. 25 Mad. 751. 2. (1902) I.L.R. 25 Mad. 752 (F.B.).

by the statute that it should have a right to make a reference to the High Court. *Cook and Kelvey*, In re[1], was a case where the Collector determined the duty under section 31 without referring the case to the Chief Controlling Revenue Authority. The party to the document applied to the Board of Revenue to interfere with the ruling of the Collector, and the latter authority referred the matter to the High Court under section 57 of the Act. It was held that unless the Revenue Authority had resting upon it the duty of disposing of a case, there would be no right to make a reference to the High Court, as the opinion of the High Court was merely to guide it in disposing of an actual concrete case. To the same effect is the decision of the Allahabad High Court in *Board of Revenue* v. *Lakshmipat*[2]. It is, no doubt, correct to say that on the terms of section 57 the Chief Controlling Revenue Authority would have jurisdiction to refer only a pending case for the decision by the High Court. But after the Constitution the matter might stand on a different footing. As under Article 226 of the Constitution it would be open to the High Court to issue a writ of *certiorari* to quash an order of an inferior Tribunal finally deciding the duty payable, the question of pendency of the case has not much importance when the person aggrieved has sought the issue of a writ under Article 226 of the Constitution. In *Appalanarasimhalu* v. *The Board of Revenue, Madras*[3], a document was impounded under section 33 of the Stamp Act and a levy was made of the deficit stamp duty and penalty. An appeal was preferred to the Collector, which, however, failed. Thereupon, a revision petition was filed before the Revenue Board, and that too was dismissed. Then the petitioner in the case filed a petition to the Revenue Board to refer the matter to the High Court. The Revenue Board refused to accede to the request of the petitioner. Thereupon, a petition under Article 226 of the Constitution was filed for the issue of a writ of *mandamus* or appropriate writ, directing the Revenue Board to refer the matter to the High Court under section 57 of the Indian Stamp Act. Subba Rao, J., as he then was, held that the High Court could issue a writ for directing the Revenue Board to refer the question involved in the case. In *Shanmugha Mudaliar* v. *Board of Revenue*[4], there was a levy of stamp duty and penalty by the Revenue Divisional Officer. An appeal against that order proved futile. Thereupon, a petition for the issue of a writ of *certiorari* was sought. But this Court refused to issue a writ. On being moved by the petitioner, this Court directed a reference under section 57 of the Indian Stamp Act. In so doing, this Court followed the decision of the Supreme Court in *Chief Controlling Revenue Authority* v. *Maharashtra Sugar Mills, Ltd.*[5]. It may be noticed that in both the cases the High Court directed the Chief Controlling Revenue Authority to make a reference under section 57 after the decision had been given by the Authority on the question of stamp duty leviable. In *Nanak Chand* v. *Board of Revenue*[6], the learned Judges have not accepted the two decisions of this Court on the ground that the question, whether a reference under section 57 could lie when there was no case pending before the Chief Controlling Revenue Authority, was not considered therein. With great respect to the learned Judges of the Allahabad High Court, I am of the view that for the purpose of the issue of an appropriate writ under Article 226 of the Constitution, that question would not arise. If, in the opinion of the High Court, the final decision of the Revenue Authority was without jurisdiction, or was vitiated by an error on the face of the record, the High Court would have ample jurisdiction to issue a writ and thereby quash the final order of the Revenue Authority. In such a case the matter would be pending before the Revenue Authority and the High Court would have jurisdiction to direct a reference under section 57 (1) of the Act. I am, therefore, of opinion that whatever might have been the position before the Constitution, by virtue of Article 226, the High Court's power to issue an appropriate writ to direct a reference under section 57 (1) of the Act does not depend upon the pendency of a case before the Chief Controlling Revenue Authority. The result is that while the Chief Controlling Revenue Authority may not have power to refer the matter under section 57 (1) in a case where there is no matter pending before it, that is to say, after the

1. A.I.R. 1932 Cal. 736.
2. A.I.R. 1958 All. 417.
3. (1952) 1 M.L.J. 641.
4. (1955) 1 M.L.J. 8 : I.L.R. (1955) Mad. 1037 : A.I.R. 1955 Mad. 304.
5. (1950) S.C.J. 444 : (1950) 2 M.L.J. 564 : (1950) S.C.R. 536: A.I.R. 1950 S.C. 218 (S.C.).
6. A.I.R. 1958 All. 320.

matter had been disposed of by any subordinate authority or by itself, the matter would be different when the High Court is approached under Article 226 of the Constitution for the issue of a writ of *certiorari* to quash the final order of the inferior Tribunal, or to issue a writ of *mandamus* to direct the Chief Controlling Revenue Authority to refer the case. If such a direction is given, the order, which has finally disposed of the matter, is deemed to have been quashed and the matter set at large. I am, therefore, of opinion that it would be open to this Court to issue an appropriate writ in the circumstances of the case.

The conclusion can, however, be reached in another way. Under section 57 the Chief Controlling Revenue Authority may state any case referred to it under section 56 (2) or otherwise coming to its notice and refer such case with its opinion to the High Court. In the present case there has been no reference by the Collector under section 56 (2). But it can be said that the matter had otherwise come to its notice, when the petitioner filed a revision petition before the Chief Controlling Revenue Authority. Section 56 (1) states :—

"The power exercisable by a Collector under Chapter IV and Chapter V and under clause (*a*) of the first proviso to section 26 shall in all cases be subject to the control of the Chief Controlling Revenue Authority."

The question, therefore, is whether an appeal or revision lies in a matter like the present one to the Chief Controlling Revenue Authority under section 56 (1). As I indicated already, the order of the Collector should be deemed to be one under section 40 (1) (*b*). The learned Additional Government Pleader has invited my attention to the two references reported at pages 751 and 752 in I.L.R. 25 Madras. In the former case the adjudication by the Collector was under section 31 which occur in Chapter III of the Act. Section 56 (1) would not obviously apply to the adjudication under Chapter III. That Chapter contains only two sections. Section 31 applies to a case where any instrument, whether executed or not and whether previously stamped or not, is brought to the Collector and the person bringing it applies to have the opinion of that officer as to the duty with which it is chargeable, and pays a fee of such amount as the Collector may in each case direct. Section 32 enables the Collector to certify whether full duty has been paid. It is obvious that under that provision the adjudication is made on the invitation of the party, and, therefore, he could not possibly contest its correctness. Under that section if the Collector feels a doubt he would be entitled to refer the matter under section 56 (2) and ask for the opinion of the Chief Controlling Revenue Authority. There is no right of appeal provided in regard to what is merely the opinion of the Collector. But the matter is entirely different in regard to the provisions of Chapter IV. There is no such invitation by the party. Whether the party likes it or not, the appropriate authority would have to adjudicate the stamp duty payable, and if there is deficit, it proceeds to collect the same together with penalty. It is, therefore, necessary to provide for an appeal in regard to such cases. In *A reference under section* 57, *the Indian Stamp Act*[1], a Sub-Registrar impounded two documents under section 33 and forwarded them under section 38 (2) to the Collector, who, under section 40 (1) (*a*), certified that they were exempt from stamp duty. It may be noticed that the decision of the Revenue Authority was in favour of the party. A certificate was issued by the Collector. The Inspector-General of Registration did not, however, agree with the opinion of the Collector and reported the matter to the Board of Revenue, which, in turn, referred the question to the High Court. It was held by a majority of the Judges that in such a case there would be no power of control under section 56 (1) and consequently the Board had no power to refer the matter to the High Court. Bashyam Ayyangar, J., held that after the Collector had decided a case and granted a certificate, the Revenue Authority had no power to interfere under section 56 (1). Moore, J., who agreed with Bashyam Ayyangar, J., in regard to the incompetency of the reference in a matter of certificate granted under section 40 (1) (*a*), however, held that the Board could interfere after an order was passed under section 40 (1) (*b*) though a certificate had been granted.

1. (1902) I.L.R. 25 Mad. 752 (F.B.).

In a stamp reference by the Board of Revenue[1], it was held that if a Collector had taken action under section 40 (1) (*b*) of the Indian Stamp Act and issued a certificate, a reference under section 57 would be incompetent. The question was considered by a Special Bench of Allahabad High Court in *Board of Revenue* v. *Lakshmipat*[2]. In that case a Collector, to whom the Court sent a document under section 38 (2) acting under section 42 (1), had certified that a proper duty and penalty had been paid. The Bench held that after the issue of the certificate there was no case pending before the Chief Controlling Revenue Authority within the meaning of section 57 (1), and that, therefore, there could be no valid reference. In coming to the conclusion, the learned Judges followed the statement of law enunciated by Bashyam Ayyangar, J., in *The reference under the Stamp Act*[3]. The distinction between a case where an excess duty and penalty were levied by the Collector and paid by the party which resulted in the issue of a certificate under section 42, and a case where the duty though levied, was not paid is made on the basis of the terms of section 56 (1) which appears to give right of appeal only in regard to a case where the powers exercisable by the Collector under Chapters IV and V are exercised. It is, no doubt, an anomaly that a person who pays stamp duty promptly is in a worse position in that he is denied the right of appeal in case where the levy by the Collector is wrong, whereas a person, who has defaulted in the payment of the duty, is able to approach the higher authority under section 56. On that question, the view of Moore, J., is in conflict with that of Bashyam Ayyangar, J. It is not, however, necessary for the purpose of the present case to resolve that conflict, as the increased duty levied by the Registrar of Assurances has not been paid by the petitioner. In regard to such matter Bashyam Ayyangar, J., has observed at page 760 in I.L.R. 25 Madras, thus :—

> " If the party delays payment there will necessarily be an interval between the impounding or the receipt by the Collector of the instrument and his certifying, and the Board can interpose its control during such interval and in fact it will be perfectly open to the Board under section 56 (1) to require that in all cases in which the Collector may have to proceed under sections 40, 41 and 42 or in regard to particular classes of instruments the Collector should, before certifying under section 40 or 42, send a return to the Board giving the required particulars which will enable the Board to interpose, if necessary, its control before the Collector makes the certificate....And, further until the Collector exercises in favour of the party concerned the various powers conferred on the Collector by the sections above referred in Chapters IV and V, the Board, has full scope to interpose its control under section 57 (1) at the instance of the party concerned or otherwise and require the Collector to exercise his power as it directs. I think it highly probable that in section 56 (1) the draftsman advisedly qualified the word ' powers ' by the adjective ' exercisable ' with a view to denote the intention of the Legislature that the Collector's powers are to be controlled by the Board of Revenue only before they have been actually executed and a right has thereby accrued to a party ".

It is, therefore, clear as the duty had not been paid the matter would be subject to the controlling jurisdiction of the Board of Revenue. It would, therefore, be a case which could properly come within its notice and the Board could, under the provisions of section 57, refer such a matter when so requested by the party concerned. In *Chief Controlling Revenue Authority* v. *Maharashtra Sugar Mills, Ltd.*,[4] the Supreme Court held that the Chief Controlling Revenue Authority has a duty to make a reference when it is called upon to do so by the party affected, and that if it declines to do so, it will be within the power of the High Court to direct the Authority to discharge the duty and make a reference. I, therefore, direct the respondent to refer the question to this Court as to the stamp duty payable, namely, whether the document in question comprises two exchanges or whether it is really made up for three conveyances. There will be no order as to costs.

R.M. *Directions given*

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1. (1917) I.L.R. 40 All. 128 (F.B.).
2. A.I.R. 1958 All. 417.
3. (1902) I.L.R. 25 Mad. 752.
4. (1950) S.C.J. 444 : (1950) 2 M.L.J. 564 : (1950) S.C.R. 536 : A.I.R. 1950 S.C. 218.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

C. V. Rajagopalachariar .. *Petitioner**

v.

The State of Madras by Collector, Tanjore .. *Respondent.*

Madras Land Revenue Surcharge Act (XIX of 1954) *and Madras Land Revenue (Additional Surcharge) Act (XXX of* 1955)—*Validity.*

It is now well settled that under the scheme of the ryotwari settlement of land tenure in this part of the country the full ownership of the land is vested in the ryotwari proprietor and land revenue is a tax imposed by virtue of the prerogative right of the State and the liability to pay land revenue does not rest on any contract. This prerogative of the State has been followed by legislation, *viz.*, Madras Revenue Recovery Act, 1864. The actual levy of the tax was delegated to the Board of Revenue. A settlement once made would ordinarily hold good for a period of 30 years and the assessment could not be arbitrarily enhanced by an executive act of the Government during the period covered by the settlement as a settlement once arrived at is in the nature of an engagement between the Government and the ryotwari pattadar.

But this limitation cannot apply to the legislature which has plenary powers of legislation. The Madras Land Revenue Surcharge Act (XIX of 1954) and Madras Land Revenue (Additional Surcharge) Act (XXX of 1955) being passed by the legislature could not be assailed on the ground that if such an act has been done by the executive it would be invalid as contravening the terms of the Settlement. The Madras Act XIX of 1954 and XXX of 1955 are valid enactments and are not discriminatory and do not violate Article 14 of the Constitution.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed with W.P. No. 41 of 1957, the High Court will be pleased to issue writs of *certiorari* calling for the records relating to the orders, dated 17th May, 1956 and 26th September, 1956 and passed by the District Collector of Tanjore, in R.C. Nos. 26411/55 M-1, and 37193/56 M-4, respectively and quash the said orders.

V. C. Viraraghavan and *P. S. Balakrishna Ayyar*, for the Petitioner.

The Advocate-General (*V. K. Tiruvenkatachari*) and The Additional Government Pleader (*K. Veeraswami*), for the Respondent.

The Court made the following

ORDER.—These Petitions are filed under Article 226 of the Constitution to call for the records relating to the orders of the District Collector of Tanjore in R.C. No. 26411/56 M-1 and R.C. No. 37193/56 M-4, and to quash orders passed thereon on 17th May, 1956 and 26th September, 1956, respectively.

The petitioner is a ryotwari pattadar owning about 250 acres of land in Edayur and Keepalerumazhai villages in Thiruthuraipoondi Taluk, Tanjore District. He also owns lands in South Arcot and Chingleput Districts. The total land revenue assessed on his lands is Rs. 1,691-9-6. This assessment was based on the ryotwari settlement effected in 1924. In 1954, the State Legislature passed the Madras Land Revenue Surcharge Act (XIX of 1954) enabling the Government to levy a surcharge on a landholder who was liable to pay a sum exceeding Rs. 500 as land revenue per year. That Act was followed by another Act XXX of 1955 which provided for the levy of an additional surcharge. The result is that in addition to the ordinary assessment of land revenue payable by a landholder there was an additional tax levied in respect of land held by a pattadar who paid more than Rs. 500 by way of land revenue. The petitioner filed a declaration of the extent of lands held by him in the State and the land revenue payable in respect thereof before the Tahsildar, Tiruthuraipoondi, on 7th March, 1955. Under section 5 of Act XIX of 1954 he was provisionally assessed to surcharge at Rs. 502-1-0 on 27th April, 1956 and notice of the provisional assessment was served upon him allowing time for filing objections thereto. No objections were, however, filed

* W.P. No. 41 and 42 of 1957. 15th April, 1959.
(25th Chaitra, Saka 1881.)

within the time allowed and the authorities thereupon proceeded to make a final assessment on 17th May, 1956. A demand followed which required the petitioner to pay a sum of Rs.502-1-0 within 7 days from the date of service of the notice. That assessment was for fasli 1364. In respect of the next fasli no declaration was filed by the petitioner and he was provisionally assessed by way of surcharge in a sum of Rs. 502-1-0 adopting the previous year's figures. In response to the notice of the provisional assessment the petitioner filed objections. That covered the objection to the assessment of the earlier fasli. In the objections the petitioner did not question the correctness of the levy but only challenged the validity of the Land Revenue Surcharge Acts. In the meanwhile the Collector proceeded to take steps for recovery of the land revenue surcharge due from the petitioner for fasli 1364. Thereupon the petitioner filed the two petitions for the issue of writs of *certiorari* to call for the records relating to the assessment of surcharge for the two faslis 1364 and 1365 and for quashing the orders relating to the levy.

In support of the petition an affidavit has been filed by the petitioner. Therein he has referred to the fact of phenomenal ravages of nature like the cyclone, drought, pest and unpresedented rains affected the Tanjore District in the years 1952 to 1956 and that his lands yielded very little income during those years. The petitioner had applied to the Government for remission of Kists in accordance with the provisions of Board's Standing Orders Nos. 13 and 14. While remission was granted for several persons, it is the complaint of the petitioner that none was granted to him. That was by reason of G.O. No. 580, Revenue, dated 26th February, 1953, which directed that the benefit of the remission of land revenue should not be given to pattadars in a Taluk paying in all an annual assessment of more than Rs. 100 and to persons who were assessed to income-tax. The petitioner complains that this Government Order is discriminatory and unjust and that he would be entitled to a remission like other Pattadars in respect of the years where there had been failure of crops due to natural causes. Under the *Explanation* to section 3 of the Madras Land Revenue Surcharge Act of 1954 the land revenue remitted is not deemed to be a land revenue payable for the purpose of the section. If, therefore, the land revenue had been remitted as according to the petitioner it should have been, there would be no occasion for a levy of surcharge. But the petitioner not having been given remission by virtue of G.O. No. 580 of 1953, he would be liable to pay not merely the full land revenue but also a surcharge as well. In the petition, therefore, both the validity of the Government Order No. 580 of 1953 as well as the validity of the two enactments of 1954 and 1955 levying surcharge are attacked. There is also a further complaint in the petition in regard to the levy of a cess under section 78 of the Local Boards Act.

On behalf of the petitioner it is first contended that the Madras Act XIX of 1954 and XXX of 1955 are invalid for two reasons. The first is that as under the ryotwari system the land revenue assessment is fixed till the next settlement is effected, it would not be open to any authority to increase the land revenue during the subsistence of the settlement. I already referred to the fact that the previous ryotwari settlement took place in the year 1924 and it is admitted that till this date no fresh settlement had been effected although the practice has been to effect a settlement once in 30 years. Under the notification issued by the Government regarding settlement of ryotwari lands in the year 1924, revenue was fixed at a certain rate. It is claimed that fixation of revenue amounts to engagement by the Government with the owners of the lands and binding on either party so that it would not be open to the Government to levy any further tax except by way of revision of the ryotwari settlement. Section 3 of the Madras Land Revenue Surcharge Act XX of 1954 states :

> "Every landholder who is liable to pay a sum exceeding Rs. 500 for fasli is liable to the Government in respect of lands held by him in the State and shall pay to the Government for that fasli a surcharge on the land revenue payable by him in respect of all lands held by him at the following rates.". . . . .

Section 4 of the Act makes a surcharge payable by the landholder recoverable as land revenue. Section 5 invests the Tahsildar of the Taluk, in which the land-

holder holds lands, with a power to call for opinion regarding the extent of the property. Section 7 gives the power to make rules. Act XXX of 1955 was enacted to provide for a further surcharge on the land revenue assessment at the rate. Section 3 of that Act authorises a levy of surcharge. Section 4 makes that surcharge recoverable as a land revenue. Section 5 enables the distribution of the additional surcharge amongst the local authorities in accordance with the rules. Section 6 gives the power to make rules. The word 'surcharge' implies an excess or additional burden or amount of money charged. Therefore, a surcharge of land revenue would also partake the character of land revenue and should be deemed to be an additional land revenue. Although section 4 of the two enactments referred to above only deems it to be recoverable as a land revenue it is manifest that the surcharge would be a part of the land revenue. The effect of the two Acts would be, therefore, to increase the land revenue payable by a landholder to the extent of the surcharge levied. If, therefore, a surcharge levy has been made, the Government would be enabled to collect a higher amount by way of land revenue from a ryotwari pattadar than what was warranted by the terms of the previous ryotwari settlement. The question to be decided is whether such an increase of land revenue in a ryotwari village could be validly made before effecting a fresh ryotwari settlement.

Mr. V. C. Viraraghavan, the learned advocate for the petitioner, referred to the decision in *Bell* v. *Municipal Commissioner for the State of Madras*[1], for the position that the assessment on lands was by virtue of prerogative which has been understood to lie within certain limits. In this connection reference was made to the observations of Bhashyam Ayyangar, J. It was stated that the Crown had according to the common law of India certain prerogatives notably the prerogative of imposing by an executive act assessment on lands and varying the same from time to time. The nature and incidence of the ryotwari system has been considered in *Madathapu Ramayya* v. *The Secretary of State for India*[2]. In that case the appellant had put up a shed and a small construction on a land which is part of a public highway. The Government relying upon the provisions of the Revenue Recovery Act II of 1864 imposed on him a prohibitory assessment. One of the items claimed in the action was for the refund of the amount collected by way of prohibitory assessment. It was held that the basis of the land revenue was that the person from whom it was collected had an interest in the land and if a person was trespasser there would be no occasion for levying the land revenue, as the land in respect of which he had committed trespass could not be said to be legally owned by him. It was, therefore held that the provisions of the Revenue Recovery Act of 1864 could not apply to that case. While considering the case whether the trespasser over a land could be made liable to pay land revenue by way of prohibitory assessment the learned Judges had to consider the features of the ryotwari system. Subramania Ayyar, J., adverting to the fundamental principles governing the assessment and collection of land revenue in ryotwari areas observed at page 389 as follows :

> "It may not perhaps be superfluous to point out that in the actual exercise of the prerogative of the Crwon above referred to, the Crown is not supposed to proceed without any regard to definite and well-established principles ; for neither in olden times nor now, has the Crown been held entitled to more than a fixed share of the produce—be it the theoretical one-sixth of the Hindu writings or the half-nett gain proclaimed by the present Government as the share it takes or some other ; section 58 of the Revenue Recovery Act having been enacted in order to save the Crown from endless litigation in Courts to which but for such a provision it would be exposed, having regard to the intricate details necessarily incident to a system of assessment, involving in theory at least the ascertainment of the produce of every acre of land in the country and the commutation of the Crown's share thereof with reference to market prices for a definite period such as the usual thirty years for which settlement money rates are fixed."

In *Prasada Rao* v. *Secretary of State for India*[3], the Privy Council referred to the practice under the ryotwari settlement to make periodical settlements with ryots whereby the Government share in the produce was computed and the lands were separately classified and held that the

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1. (1902) 12 M.L.J. 208 : I.L.R. 25 Mad. 457.
2. (1903) 14 M.L.J. 37 : I.L.R. 27 Mad. 386.
3. (1917) 33 M.L.J. 144 : L.R. 44 I.A. 163 : I.L.R. 40 Mad. 886 (P.C.).

actual payment was incapable of increase during the period for which settlement was made. In *Secretary of State for India* v. *Ramalingachariar*[1] it was held that when once a ryotwari land was classed as dry under a settlement for a period of 30 years such a land cannot during that period be reclassified as wet and if a demand was made by the Government for increased assessment such a demand was *ultra vires*. A suit to declare such an assessment as illegal and to obtain a refund of the amount levied was therefore held maintainable and not barred by section 58 of the Revenue Recovery Act. The matter was again considered in *Kelu Nair* v. *Secretary of State for India*[2]. In that case Government sought to levy increased assessment in respect of certain lands known as Kumiri lands during the subsistence of a ryotwari settlement. The learned Judges held that a notification by which the Government makes a ryotwari settlement for 30 years was binding on the Government and that it would not be open to them to increase or enhance the rate fixed under the settlement during the period of 30 years for which the notification was made. The learned Judges referred to the nature of the ryotwari tenure and held that the origin of the power to levy assessment to arable land was by virtue of a prerogative of the Crown and that in the actual exercise of the prerogative the Crown could not proceed without any regard to definite and well-established principles one of them being that the rate of assessment fixed at a particular settlement could not be increased during the subsistence of that settlement. From the principles laid down in the cases referred to above it is contended that such rates fixed at the time of the previous ryotwari settlement in the year 1924 could not be altered during the subsistence of the settlement. It was then urged that it would not be open even to the Legislature to increase that rate under the guise of a revenue surcharge of land revenue. The validity of this contention depends upon the nature of the land revenue assessment and the power of the Legislature to vary during the subsistence of a prior ryotwari settlement.

The incidence of a ryotwari tenure has been considered in a number of decisions. That was a system conceived for the purpose of collection of land revenue without the aid of a middleman, the ryots being treated as proprietors of their holdings liable to pay assessment directly to the Government. The features of a ryotwari settlement has been considered in *Gopalan* v. *State of Madras*.[3] Under that system the Government does not purport to grant any title deed to the proprietor. What is given is only a patta, which has been held to be, not a title deed, but only a bill or an evidence of the fiscal arrangement between the ryot proprietor and owner. Although no title deed as such is granted to the pattadar, there is no doubt that the interest of the pattadar is a proprietary right over the soil. The Madras Land Encroachment Act III of 1905 which was passed to counteract the decision in *Madathapu Ramayya* v. *The Secretary of State for India*[4] incidentally declared what is Government property. Section 2 referred to the property of the Government and among the properties which are excepted from the ownership of the Government are lands held under a ryotwari tenure. That would indicate the recognition by the Legislature that the pattadar is the owner of the property. The provisions of the Madras Revenue Recovery Act II of 1864 is consistent only with the pattadar being such owner. The term 'landholder' had been defined to comprise a holder of land under tyotwari settlement. Section 2 enacts that the land was security for public revenue. One can conceive of the property being a security for a liability only if the property belongs to the person liable and not to the person to whom the debt is due. Section 26 refers to the land as the defaulter's land. Section 42 provides that in a case where the land was sold for arrears of revenue any balance remaining after the discharge of the arrears should be paid over to the defaulter. These provisions indicate that the full ownership of the land is vested in the ryotwari proprietor. Therefore, the levy of an assessment on such property could not be held to be in the nature of a rent though in origin the assessment was based on a share of the produce. To call such a levy as rent would imply that the Government

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1. (1924) 47 M.L.J. 780 : I.L.R. 48 Mad. 282.
2. (1925) 49 M.L.J. 79 : I.L.R. 48 Mad. 586.
3. (1958) 2 M.L.J. 117.
4. (1903) 14 M.L.J. 37 : I.L.R. 27 Mad. 386.

had an interest in the property. I have already indicated that the Government have no interest as owner of the property, but their interest is only by way of security for the amount of assessment payable. In such a case the assessment cannot be held to be a rent which was the subject-matter of a contract between the parties but only a tax. In *Secretary of State for India* v. *Venkatapati Raju*[1] it was held that the land revenue is a tax imposed by virtue of the prerogative of the State and that the liability to pay land revenue did not rest on a contract or any relation resembling the contract. Under that system soil itself is taken and the assessment is fixed on the land and does not depend on the nature of the crops grown. The origin of the right to levy such a tax was the prerogative of the Crown. That prerogative right has been followed by legislation, *viz.*, the Madras Revenue Recovery Act II of 1864. The lines on which the ryotwari assessment was made were accepted by that enactment and a machinery was provided for its levy and collection. The actual levy was the subject-matter of delegation to the Board of Revenue. But such delegation was within permissible limits. The delegated authority, *viz.*, the Board of Revenue fixes the assessment on the basis of the income from lands, half the net income being taken as the guiding principle in the matter of assessment. A settlement once made would ordinarily be good for a period of 30 years. That is to say, that by an executive act (or by virtue of any prerogative that it may possess) it would not be open to the Government to increase the assessment during the period covered by the settlement. But that could not, however, prevent the Legislature from increasing the assessment by an enactment. Venkatasubbayya Rao, J., in *Kelu Nair* v. *Secretary of State for India*[2] recognises that principle when he stated at page 594 thus :

"The question in the present case is, is there an engagement between the Government on the one hand and the ryotwari holders on the other. *If there is, the Government's action is illegal for they do not rely upon any statute in their favour.*"

A distinction should, therefore, be made between a case where the Government by an executive act tries to enhance the land revenue in respect of a ryotwari holding during the currency of a settlement and before its revision, and a case where the Legislature steps in to add to the burden on the subject. In the former case the attempt of the executive authority would be illegal for two reasons, (1) that the incidence of the ryotwari tenure itself is that the land revenue would not be liable for enhancement or change during the currency of a settlement at which the rate was fixed. Secondly the Board of Revenue or the Executive Government being only a delegate for fixing the rate at the time of settlement would not have the power to increase it at any intermediary stage. But those considerations cannot apply to a Legislature which has plenary powers of legislation. Limitation placed upon the power of the Board of Revenue would not apply to the case of a Legislature. Both under the Government of India Act of 1935 as well as under our Constitution the State Legislature possesses full powers to levy a tax in regard to agricultural lands. Act XIX of 1954 and Act XXX of 1955 being passed by the Legislature could not, therefore be assailed on the ground that if such an act had been done by the Executive Government or the Board of Revenue it would be invalid as contravening the terms of the settlement.

It was then contended that the Act being discriminatory and contravening Article 14 of the Constitution was void. Section 3 of Act XIX of 1954 exempted landholders paying less than Rs. 500 as revenue from surcharge. In fixing the rates the slab system was adopted under which the rate of surcharge progressively increased from two annas to eight annas on each rupee of the land revenue paid. It is contended that this section is discriminatory in its operation as a distinction has been made between rich and poor people and as the levy of tax was different for different classes of owners. I cannot see how the classification for taxation on the basis of the personal qualification which is almost universal should be held to be illegal.

This question appears to have arisen in American Courts. In Willis on Constitutional Law it is stated :

1. (1912) 23 M.L.J. 746.
2. (1925) 49 M.L.J. 79 : I.L.R. 48 Mad. 586.

"The Supreme Court permits a wider discretion in classification under the power of taxation, if possible, than it does under the police power. One reason for this undoubtedly is the urgent need for revenue by the various governmental agencies. A State does not have to tax everything to tax something. It is allowed to pick and choose districts, objects, persons, methods, and even rates for taxation if it does so reasonably......All it says is that the States shall not deny to any persons within their jurisdiction the equal protection of the laws."

In Rottschaefer on Constitutional Law at page 672 it is observed :

"It is common feature of inheritance and estate taxes to graduate the rates progressively and to adjust the rates on the basis of the relationship of the decedent to those who succeed to his property. The classifications involved in those features have been invariably held not to violate the equal protection clause. Nor does that clause prohibit a state from directly or indirectly imposing a proportionately larger tax on the succession to a residuum of a large estate than a smaller estate, although the residuary estate and residuary legacy be equal in each instance............

The equal protection clause permits a state to establish resaonable exemptions from these taxes. There have been but few classifications resulting from the provisions of......

The principles employed in determining the validity of progressive rates and exemptions in connection with inheritance and estate taxes have also been applied to state income-taxes. The equal protection clause has invariably been held to permit progressively graduated income-taxes, the exemption of some of the income of all taxpayers, and the exemption of all the income of those classes for whose exemption there exists a reasonable basis. The same features are almost invariably held not to violate a state constitutional requirement that taxes be uniform upon the same class of subjects...."

On the principles stated above the Land Revenue Surcharge Acts of 1954 and 1955 could not be validly challenged as contravening Article 14 of the Constitution.

Mr. V. C. Viraraghavan next contended that during the years 1952 to 1956 there was a total failure of crops in the lands owned by the petitioner and that no land revenue, much less a surcharge, should be levied as if levied, they would exceed the income from the property. As the ryotwari assessment has always been considered to be based on a share of the income it was contended that when there was no income there should be no tax. Support for this contention was sought in the observations of Bhashyam Ayyangar, J., in *Madathapu Ramayya* v. *The Secretary of State for India*[1] at page 398 where the learned Judge stated :

"Fourthly, that the immemorial and common law prerogative of the Crown in India is only to the Rajabhagam or King's share in the produce of the land and the land revenue or assessment now levied on land represents the King's share in the produce and the Courts have no jurisdiction to question the rate of share that the executive Government may fix at the periodical revision of assessment but a share of the produce—however high the share or rate may be in relation to the total produce—cannot exceed the produce."

It is contended that as the levy of land revenue and surcharge would have an effect of exceeding the produce in the years when there was no crop on the land at all, the assessment during the years complained of was illegal. It is difficult to accept this argument. The ryotwari assessment, although it is fixed on the basis of a share of produce, is not an assessment to be made every year commensurate with the produce of the land. It is not analogous to the waram system under which the lands are cultivated in the Tanjore District whereby the landlord and tenant each take a fixed or agreed share of the produce. The procedure at the time of a ryotwari settlement has been set out in the Board's Standing Orders and in Soundararaja Iyengar's "Land Tenures in Madras Presidency" at page 168. That would indicate that the land revenue was fixed on what the soil would yield and not on the basis of the actual yield of the land. In the ascertainment of assessment allowances are made for failure of crops and bad seasons at a certain percentage. The income thus ascertained is commuted into money value having regard to the price of the produce during the previous 20 non-famine years. There again allowances are made for cultivation, cartage and other expenses. Thus the land revenue, though based in theory on the nett income from the land, could not properly be held to be a share of the actual income every year, though it may perhaps represent a share of the produce at the time of the settlement. It follows that in years where the crops are good and or the prices are high the landholder would realise considerably more than half the nett income as he would have to pay the Government only a

1. (1903) 14 M.L.J. 37 : I.L.R. 27 Mad. 386.

commutated rate as fixed at the previous ryotwari settlement. It may be that in certain years there is a partial or total failure of crops. As the assessment is made on the basis of what the land is capable of yielding till the next settlement, it would not depend on the vicissitudes of agriculturist's fortune. To adopt such a principle would complicate the process of assessment and the realisation of the revenue. The assessment being fixed for the duration of the settlement, the landholder who has the advantage in years of plently could have no reason to complain if in certain years there is a partial failure of crops. In cases where there is a total failure of crops, provision is made in the Board's Standing Orders, though now modified by the impugned G.O. No. 683, for granting a remission of tax. Therefore, independent of any remission that a landholder may obtain, the tax was fixed at the last ryotwari settlement regardless of the question whether the income was high or low. I cannot, therefore, accept the contention of the learned advocate for the petitioner that in famine years the Government has no right to levy any land revenue on the principle that the Government is entitled to only a share in the produce.

It was next contended on behalf of the petitioner that the refusal of the Government to grant remission to the petitioner was illegal. It is unnecessary to consider this argument in detail in view of the decision of Govinda Menon, J., in *Venkatanaranappa and others* v. *The State of Madras by Secretary to Government, Land Revenue*[1] and *H. H. Sri Vanamamalai Ramanuja Jeer Swamigal* v. *The State of Madras, by Collector of Tirunelveli*[2], which dealt with the precise point. The learned Judge held that the question of remission of land revenue should not be considered from the point of view of fundamental rights and no question of classification could arise in such a matter. The learned Judge also held that G.O. No. 580, dated 26th February, 1953, which modified the rules for grant of remission of land revenue contained in Board's Standing Orders 13 and 14 were valid. After considering various authorities on the subject the learned Judge summed up the position thus :

> " I am inclined to think that the question of remission cannot be considered from the point of view of fundamental rights and as such no question of classification can arise. There is no right in a person to get a remission of land revenue. Even if it can be understood as a fundamental right and Article 14 can be applied, still it seems to me that there has been a reasonable and just classification which is practical from all points of view. Such reasonable classification exists in section 4 of the Madras Agriculturists Relief Act which is to the effect that the Act would not apply to persons who pay income-tax or who pay land tax above a certain sum. It is not a practical proposition to find out the exact land revenue payable by one individual in more taluks than one. Such an enquiry would be beset with difficulties of an overwhelming nature not commensurate with the result that is likely to be achieved. Therefore, when the Government stated that persons who pay more than Rs. 100 as land revenue in one taluk could not have the benefit of the G.O., there has been a reasonable classification which comes within the seventh proposition laid down by Fazl Ali, J., in *State of Bombay* v. *Balsara*[3].
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> Therefore, viewd in either light, *viz.*, if the G.O. is a law, then there is proper classification or if it is an executive or administrative act, then there is no fundamental right involved to ask for a remission, the G.O., cannot be impugned."

I am in respectful agreement with the observations and conclusion of the learned Judge. There is, therefore, no substance in the contention of the learned advocate for the petitioner that the levy of surcharge was illegal. These Petitions, therefore, fail and are dismissed. No order as to costs.

R.M. *Petitions dismissed.*

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1. W. P. No. 332 of 1953.
2. W. P. No. 437 of 1953.
3. (1951) S.C.J. 478 : (1951) S.C.R. 682 : (1951) 2 M.L.J. 141 (S.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA AIYAR.

Sundaram Motors Ltd., Madras .. *Petitioner**

v.

State of Madras, by Commercial Tax Officer .. *Respondent.*

Madras General Sales Tax Act (IX of 1939), *section* 2 (h) *and* (i) *and Turnover and Assessement Rules, rule* 4 (3) *and notifications issued thereunder—Sale and works contract—Taxing works contract on* 70 *per cent. of the turnover—Validity.*

It is now settled law that ' works contract ' as such cannot amount to a sale of the materials involved or absorbed in the execution of the work and a power to tax sales cannot be extended to transactions which are not sales by merely enacting that they shall be deemed to be sales. But if in any case a works contract includes sale of goods, the levy of sales-tax on such sale will be proper.

Whether in any case of a works contract there is a sale of any component part involved is a question depending on the facts of each case. To tax a works contract at a particular percentage of the turnover, even though such a procedure was sanctioned by any provision of the Act, Rules or any notification, is illegal as the State Government has no power to legislate and tax works contract treating any portion of it, as sales.

Gannon Dunkerley & Co. v. *State of Madras*, (1955) 1 M.L.J. 87 and *State of Madras* v. *Gannon Dunkerly & Co., Ltd.*, (1958) 2 M.L.J. (S.C.) 66 : (1958) 2 An. W.R. (S.C.) 66 : (1958) S.C.J. 696 : 9 S.T.C. 353 (S.C.), followed.

Even in such cases the cost of materials which got used up in the carrying out of the work cannot be treated as ' sales ' as there is no transfer of property to the customer as such. Where parts are supplied at a stated price, there may be a sale of such parts. But where parts are fabricated by the contractor in the course of carrying out the works contract and there is no agreement between the parties that such parts would be treated as sold " *separatim* " the mere incorporation of such parts in the larger property, the subject-matter of the works contract, cannot amount to sale of such parts merely because the larger property is delivered to the customer after the work on it is completed.

Petition under section 12-B (1) of Madras General Sales Tax Act praying the High Court to revise the order of the Sales Tax Appellate Tribunal, Madras, dated 16th July, 1956 and made in S.T.A. Nos. 617, 593, 594 and 595 of 1955 respectively (A. No. S. M. 11-51-52, A. No. S. M. 146-52-53, A. No. S.M. 49-53-54, and A. No. S. M. 164-54-55 on the file of the Special Commercial Tax Officer for Appeals, Madras City).

K. V. Venkatasubramania Ayyar and *N. R. Govindachari*, for Petitioner.

The Advocate-General (*V. K. Thiruvenkatachari*) and the Additional Government Pleader (*K. Veeraswami*), for Respondent.

The Order of the Court was made by

Ramachandra Aiyar, J.—These tax revision cases are filed under section 12-B (1) and rule 13 (*c*) (1-A) of the Madras General Sales Tax Act. The assessee is the petitioner in all these cases and they relate to assessments in respect of years, 1949-50 to 1952-53. Sundaram Motors (Private) Ltd., the assessee, is a private limited company incorporated under the Indian Companies Act, and it carries on business in selling and distributing motor vehicles. It also deals in motor parts and accessories and maintains a workshop where reconditioning or repairs of motor vehicles are undertaken. The turnover in the business of the company would, therefore, relate to the sales department, where the goods are sold, and also to the works department where the vehicles are repaired or reconditioned. In the latter case, the turnover represent not merely the labour charges as such but the cost of spare parts or would material supplied or used in effecting the repairs. There is no controversy in regard to the turnover in the sales department and these revision cases are concerned mainly with the transactions in the workshop department of the company.

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* T.R.C. Nos. 233 to 236 of 1956.

2nd September, 1958.
(11th Bhadra—1880 Saka).

Although the turnover for the various assessment years vary, the nature of the business and the question to be decided in the cases are the same. It would be convenient for the purpose of deciding the question involved if the assessment for the year 1949-50 is taken as a typical one. For that year the Deputy Commercial Tax Officer assessed the turnover of the company in a sum of Rs. 42,13,684-13-9. Out of that sum the Officer allocated a sum of Rs. 2,63,462-6-9 as turnover in respect of works contracts referable to repairs of motor vehicles in the workshop. He deducted a sum of Rs. 46,874 therefrom on account of sums charged for services pure and simple. He held that the balance of Rs. 2,16,548-6-9 should be treated as turnover in respect of works contracts and levied a tax on 70 per cent. thereof as representing the sales of materials to the customers while executing the works, repairs, etc. On appeal the Special Commercial Tax Officer held that out of the sum of Rs. 2,16,542-6-9 (1) Rs. 1,27,765 would represent pure labour charges, (2) Rs. 73,627 would represent works involving transfer of property and (3) Rs. 15,158 would represent charges for the manufacture of spare parts. He taxed seventy per cent., of item 2 at 3 pies per rupee and the whole of item 3 at nine pies per rupee. The assessment was taken up on appeal to the Sales Tax Appellate Tribunal. Substantially two questions were raised before the Tribunal and they were :—(1) in regard to the validity and proper rate of levying tax on the sales-tax collected by the assessee and (2) the proper method of assessing workshop transactions. The Appellate Tribunal held that the assessee was liable to pay sales-tax on the sales-tax collected by them and that the rate of levy adopted by the department was correct. On the second question it held that the department correctly assessed works contracts at seventy per cent. of the turnover. In the result the order of the Special Commercial Tax Officer was confirmed. Thereupon the assessee has preferred these Tax Revision Cases in respect of the assessment for the four years stated above.

The learned advocate for the assessee did not contest the correctness of the finding of the Appellate Tribunal in regard to the tax liability on the sales-tax collected by the assessee and also as regards the rate of levy in view of the decisions reported in *The State of Madras* v. *The Bangalore Automobiles*[1] and *Sundararajan & Co., Ltd.* v. *State of Madras*[2].

The only question argued before us related to the propriety of the assessment in regard to workshop transactions.

The validity of the provisions of the Sales Tax Act in regard to works contract has been considered by a judgment of this Court to which one of us was a party, in *Gannon Dunkerley & Co.* v. *State of Madras*[3]. That judgment was taken up in appeal to the Supreme Court, which recently affirmed the correctness of the view taken by this Court. The judgment of the Supreme Court is reported in *The State of Madras* v. *Gannon Dunkerley & Co., Ltd.*[4].

Under section 2 (*h*) of the General Sales Tax Act (XXV of 1947) the definition of the word " sale " was enlarged so as to include transfer of property in the goods involved in the execution of a works contract. In the definition of the expression " turnover " in section 2 (i), *Explanation* (1) stated that the amount for which goods are sold in relation to a works contract shall be deemed to be the amount payable to the dealer for carrying out such contract less such portion as may be prescribed of such amount representing the usual proportion of the cost of labour to the cost of materials used in carrying out such contract. The word " works contract " was also defined in section 2 (i) (1) as meaning any agreement for carrying out for cash or for deferred payment or other valuable consideration, the construction, fitting out, improvement or repair of any building, road or bridge or other immovable property or the fitting out, improvement or repair of any movable property. Under the Turnover and Assessment Rules framed under the Act, rule 4 (3) stated that

1. (1956) 7 S.T.C. 537.
2. (1956) 7 S.T.C. 105.
3. (1955) 1 M.L.J. 87.
4. (1958) 2 M.L.J. (S.C.) 66 : (1958) 2 An. W.R. (S.C.) 66 : (1958) S.C.J. 696 : 9 S.T.C. 353 (S.C.).

the amount for which goods are sold by a dealer shall in relation to a works contract be deemed to be the amount payable to the dealer for carrying out such contract less a sum not exceeding such percentage of the amount payable as may be fixed by the Board of Revenue from time to time. In pursuance of that rule a notification has been issued fixing the cost of labour at 30 per cent., the cost of materials being thereby fixed at 70 per cent. in regard to all contracts except those for which the notification fixed a special percentage. Under that notification the assessment in the instant case would be on the basis of 70 per cent. of the value of the works.

The effect of the judgments in *Gannon Dunkerley's case* both here[1] and in the Supreme Court[2] was that the works contract as such cannot amount to a sale of the materials involved or absorbed in the execution of the work, and the Madras General Sales Tax Act, 1939, in so far as it purpoted to tax such works on the basis of a notional sale is *ultra vires*. In the *State* of *Madras* v. *Gannon Dunkerley*[2] the Supreme Court observed at page 373 :—

" A power to enact a law with respect to tax on sale of goods under Entry 48 must, to be *intra vires*, be one relating in fact to sale of goods, and, accordingly, the Provincial Legislature cannot, in the purported exercise of its power to tax sales, tax transactions which are not sales by merely enacting that they shall be deemed to be sales."

Although the effect of the judgment is to negative the power of the State to tax a works contract as such there is no impediment in the State levying a tax on the sale of goods properly so called. If therefore a works contract includes sale of goods the levy would be proper. If on the other hand the contract is only a works contract with no element of sale of goods it would not be taxable.

Contracts which involve labour and work may relate to a chattel or to buildings or other immovable property. As stated in *Gannon Dunkerley* v. *State of Madras*[1] at page 95 :

" A contract purely for the supply of labour and work is not a contract of sale of goods, as labour and work cannot be deemed to be goods in any sense of the term. In the case of a chattel it has to be produced by the labour and work of the contractor and also by the supply of the material necessary for producing the thing. In other words when the material is fixed to the corpus by the builder the property passes when the property in the larger corpus itself passes to the other party. This rule is, of course, subject to special stipulations in the contract."

In a building contract, for instance, there is no element of sale of materials used in the building separately, as the contract would be one in substance and in effect not a contract of sale of materials. It is now settled that in the case of a building contract the property and the materials used do not pass to the other party to the contract as movable property in the absence of any agreement between the parties relating thereto. It may be in particular cases that even in regard to building contracts where the materials employed in the building cease to be movable property there may be an agreement to pass the ownership in the materials for a price agreed upon between the parties, in which case the contract might contain an element of sale of goods. This was recognised in the judgment of this Court in *Gannon Dunkerley* v. *State of Madras*[1] at page 96 and by the Supreme Court in *State of Madras* v. *Gannon Dunkerley*[2]. As regards works contract relating to movable property the Supreme Court has observed at page 386 :—

" It may be as was suggested by Mr. Sastri for the respondents that when the thing to be produced under the contract is movable property then any material incorporated into it might pass as a movable, and in such a case the conclusion that no taxable sale will result from the disintegration of the contract can be rested only on the ground that there was no agreement to sell the materials as such ".

If, for instance, a car is sent to a motor workshop with instructions to fix up a carburettor, and the repairer who is a dealer in such parts supplies the carburettor, it will be a sale of the part ; but such cases apart it cannot be held as a general proposition that in every case of a works contract there is necessarily implied a sale of the

1. (1955) 1 M.L.J. 87.
2. (1958) 2 M.L.J. (S.C.) 66 : (1958) 2 An. W.R. (S.C.) 66 : (1958) S.C.J 696 : 9 S.T.C. 353 (S.C.).

component parts which go to make up the repair. That question would depend on the facts of each case. But the order of the Sales Tax Appellate Tribunal is based on the Rules framed under the Act, which prescribed an artificial and fixed proportion of 30 per cent. turnover as labour charges and 70 per cent. as cost of materials used. The assessment was not made on the basis that there has been a sale as such of the materials used in the repairs or that the contract was a severable one in which the sales were singled out and taxed. It proceeded to treat the contract as an integral one and levied a tax on 70 per cent. thereof as representing the sale of materials. This was no doubt in accordance with the provisions of the Act and the Rules and notifications thereunder. But in view of the decisions referred to above we have to hold that the State Government has no power to legislate and tax a works contract by treating it or a portion of it as sales, and that this method of assessment is illegal.

Before us, therefore, the learned Advocate-General put the case for the State on the footing that the works contract was really a combination or mixture of a contract of a sale of materials and a contract to pay the cost of labour, and that it is possible to separate the one from the other.

The question then is whether the transactions in the workshop business of the assessee should be deemed to be pure works contracts or contracts coupled with a series of sales of movable property. To appreciate the nature of the transactions an illustration will be taken from the accounts of the company. A bill issued to one Mr. K. Narasimhalu on the 5th of April, 1950, will be typical of the way in which the matter was treated by the assessee. That bill was, in connection with the repair of a car owned by him, and it runs thus :—

Sundaram Motors Limited,
37, Mount Road, Madras.
S.S. Debit Note 13609/13611.
Date : 7th April, 1950.

Mr. K. Narasimhalu Naidu,
Crown Talkies, Madras,
Repair Order No. 7960. Registration No. M.D.K. 1186.

		Rs.	A.	P.
1.	Brg. assy. front wheel Inner ..	29	12	0
2.	King-pins ..	10	8	0
3.	Cleaning materials ..	0	8	0
4 to 12	x x x x x ..	x	x	x
	Total of items 1 to 12 ..	58	15	6
A.	To charges for renewing king-pins and bushes ..	15	0	0
B.	To turning 4 king-pin bushes ..	10	0	0
C.	To washing car by power, lubricating all points, checking all oil levels, cleaning engine, checking tyre pressure and radiator water— ..	10	0	0
D.	To charge battery ..	2	8	0
E.	To examining stg. connections and checking toe in— ..	3	8	0
		103	1	3 or
		103	1	0

The first 12 items of the bill amounting to Rs. 58-15-6 represent the charges for motor parts as such. These transactions though made in the course of executing the repairs were treated as sales, and the sales tax was collected from the customer. Thereafter there are four items, namely, A and C to E which are obviously in the nature of labour charges. (A and C to E are charges for renewing king-pin bushes, washing, lubricating, etc., charging battery and examining steering connections, etc.) Item B is mentioned as " To turning four king-pin bushes Rs. 10." The total bill comes to Rs. 103-1-3. In regard to this sum of Rs. 10, which was debited to the account of the owner of the car, further details are available in the books. The king-pin bushes appear to have been " fabricated " out of a brass rod 7/8" thick. The books of the assessee give the details as to how the sum of Rs. 10 charged for the turning of the king-pin bushes was arrived at. They run thus :

Cost of brass rod 7/8" thick	..	0	13	6
„ Cotton waste	..	0	2	6
„ Letinax	..	0	6	0
Totalling roughly Re. 1-6-0				

In another portion of the books this sum of Re. 1-6-0 is shown as the cost of the material and the balance Rs. 8-10-0 is clubbed with other labour charges. So that with respect to the fabrication and supply of four king-pin bushes only the cost of material and the labour charges are included. The books do not prove either that any profit was added to this amount or that the king-pin bushes were manufactured on a commercial scale and four articles supplied therefrom.

Reverting to the bill mentioned above one can classify it broadly into four items:

1. Sales of motor spare parts as such,
2. Labour charges debited as such,
3. Price of used-up materials like polish, waste cotton for polishing, etc.,
4. Cost of the fabricated materials which included the cost of the raw material and the cost of labour.

There is no controversy now in regard to items 1 to 3 above. In regard to item 1 the assessee has treated the transactions as sales and has collected sales-tax from the customer, and the same has been paid to the State. The learned Advocate-General appearing on behalf of the State has stated before us that the State would not be entitled to levy any tax on the labour charges as also on the price of materials which got used up in the course of repairs, *e.g.*, polish, cotton waste, etc. In the latter case there would be no transfer of property to the customer, and it is not possible to conceive that those materials were sold as such to him. What, therefore, remains is the 4th item, the charges in respect of the fabricated materials.

If a car is sent to the assessee for repair and some spare parts have to be fitted and those spare parts ard either available with them or in the market, such parts are supplied any sales-tax collected from the customer. Such a supply is treated by the assessee itself as a sale of those spare parts. But if such spare parts are not available, the assessee manufactures those parts for the purpose of effecting repair in its, what is stated to be a well-equipped, workshop. It would be convenient to refer to them as " fabricated parts ". An illustration of this is the item in respect of which charges for "turning four king-pin bushes Rs. 10" is made in the accounts. We have indicated already that the charges comprise the cost of material and labour. It is argued for the State that in regard to this fabricated part it was really a sale of such part to the customer, and therefore the assessee would be liable to pay the tax thereon. In the particular case referred to by way of illustration it is contended that Rs. 10 would represent the sale price of the four king-pin bushes. It is therefore necessary to consider whether there has been a sale by the assessee to the customer of the fabricated materials, *e.g.*, four king-pin bushes. Neither the bill issued to the party nor the account books of the assessee support the case of a sale of the four king-pin bushes as such.

In order to constitute a sale it is necessary that there should be an agreement between the parties, on the part of the assessee to sell and on the part of the customer to purchase. In The *State of Madras* v. *Gannon and Dunkerley & Co.*,[1] the Supreme Court observed :

> " Thus according to the law both of England and of India in order to constitute a sale it is necessary that there should be an agreement between the parties for the purpose of transferring title to goods, which of course, presupposes capacity to contract, that it must be supported by money consideration and that as a result of the transaction property must actually pass in the goods."

It has been pointed out that a mere passing of the property in the particular chattel is not decisive of the question whether the component parts of that chattel were sold or not. That is to say if a particular motor part, *e.g.*, king-pin bushes is put in the car while reconditioning and repairing it, it is undoubted that title to that

1. (1958) 2 M.L.J. (S.C.) 66 : (1958) 2 An. W.R. 66 : (1958) S.C.J. 696 : 9 S.T.C. 353 at 365 (S.C.).

motor accessory passes when the repairer delivers the car to its owner; but to constitute a sale of that part it is necessary that there should have been an agreement between the parties for the sale of that accessory. In the *Gannon Dunkerley case*[1], this Court held that in the case of chattel which has to be produced by the supply of labour and work of the contractor and also by the supply of materials necessary for producing the thing, when the property in the larger corpus passes to the other party, the contract is one for the supply of the larger chattel, and that there was no contract for sale or purchase of the component materials "*separatim*". In the instant case there is no question of the transfer of property in the larger corpus, *viz.*, car, as the car belonged to the customer. The contract was to execute works on the car of the customer, and in the course of such repairs certain new accessories or parts had to be put in. There is no doubt that the property in those materials would eventually pass to the customer, but the question would be whether the agreement between the parties was that such parts should be treated as sold "*separatim*" or were they merely supplied in the course of carrying out a works contract of repair and charged as such.

Therefore whether in a particular case there is a contract of sale of materials as distinct from a pure works contract would depend upon the agreement between the parties and on proof of an intention to sell the materials as such. This aspect of the case has been considered by the Supreme Court in the judgment referred to above at page 377 thus:

"It has already been stated that both under the common law and the statute law relating to sale of goods in England and in India to constitute a transaction of sale there should be an agreement, express or implied, relating to goods to be completed by passing of title in those goods. It is of the essence of this concept that both the agreement and the sale should relate to the same subject-matter. Where the goods delivered under the contract are not the goods contracted for, the purchaser has got a right to reject them or to accept them and claim damages for breach of warranty. Under the law, therefore, there cannot be an agreement relating to one kind of property and a sale as regards another. We are accordingly of opinion that on the true interpretation of the expression "sale of goods" there must be an agreement between the parties for the sale of the *very goods* in which eventually property passes."

The Supreme Court then quotes with approval a passage from the judgment of Blackburn, J., in *Appleby* v. *Myers*[2], which is in these terms :—

"It is quite true that materials worked by one into the property of another become part of that property. This is equally true whether it be fixed or movable property. Bricks built into a wall become part of the house ; thread stitched into a coat which is under repair, or planks and nails and pitch worked into a ship under repair become part of the coat or the ship".

Two more elements at least are therefore necessary in addition to a transfer of a movable property to constitute a sale. (1) There should be an agreement between the parties to sell and purchase and (2) that agreement should be with reference to the particular goods. A mere incorporation of a movable thing into a larger property and transferred when the latter is delivered over to the customer cannot by itself amount to a sale.

In this connection reference was made by the learned Advocate-General to the case in *Love* v. *Norman Wright* (*Builders Ltd.*)[3]. That was a case where the defendants to the action had agreed with the Secretary of State to supply black-out curtains and curtain rails and fix them in a number of police stations. The defendants in their turn entered into a sub-contract with the plaintiffs that they should prepare those curtains and rails and erect them in the police stations. The question which arose for consideration was whether the sub-contract was one for sale of goods or for work and service, the supply of the material being only in connection with the work undertaken. It was held that it was for sale. In coming to the conclusion that it was a sale it was observed by Goddard, L.J. :

"On this point we agree with the learned Judge who has held that as the contract involved transferring to the defendants for a price chattels, namely, curtains in which they had no previous property, it was a sale of goods. If one orders another to make and fix curtains at his house the contract is one of sale though work and labour was involved in the making and fixing...."

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1. (1955) 1 M.L.J. 87.
2. L.R. (1867) C.P. 651.
3. L.R. (1944) 1 K.B. 484.

It is clear from the facts of that case that the agreement was to supply curtains, and the mere fact that they were agreed to be prepared, supplied and fixed up would not deprive the contract of its essence, *viz.*, a sale of the curtains. This rule cannot apply where the contract was to execute a work or repair which involved the supply of certain movables for effecting the repairs, in respect of which movables there was no specific intention either to sell or to purchase.

In the present case it cannot be said that the intention was to sell the king-pin bushes as such.

Rarely customers know or even care to know anything about the parts to be replaced ; the necessity for replacement is often discovered only during the process of repair. To them the transaction is very often an integral one ; on the part of the assessee the parts were needed in the course of effecting repairs to the car and were fabricated *ad hoc.*, *i.e.*, for that purpose. It was a manufacture of the material occasioned by reason of the undertaking to repair the car and not one done as part of a commercial undertaking: to quote the words of the learned advocate for the petitioners, it was "an *ad hoc* manufacture in connection with the repair of the car". The elements necessary for constituting a sale of the part as such are therefore lacking in the case.

In this connection reference may be made to a passage in Benjamin on Sale (8th edition) at page 167 :

> " Where a contract is made to furnish a machine or a movable thing of any kind and before the property in it passes, to fix it to land or to another chattel it is not a contract for the sale of goods. In such contracts the intention is plainly not to make a sale of movables, as such but to improve the land or other chattel, as the case may be. The consideration to be paid to the workman is not for a transfer of chattels but for work and labour done and materials furnished."

We are of opinion that the principle stated above would apply to the present case. If the essential intention of the parties was to have the car repaired, the manufacture of a particular chattel could only be incidental to the repair and not one for the sale of it.

In *Pandit Banarsi Das Bhanot* v. *State of Madhya Pradesh*[1], the Supreme Court has observed that the prohibition against imposition of tax is only in respect of contracts which are single and indivisible and not of contracts which are a combination of distinct contracts for sale of materials and for work, and

> " that nothing shall prevent the sales-tax authorities from deciding whether a particular contract falls within the one category or another and imposing a tax on the materials where the contract belongs to the latter category."

In the present case there is no evidence of any anterior agreement between the parties in regard to the transaction. The only evidence available consists of the account books of the assessee as well as the bills issued by it to the customer. In the accounts the assessee has made a distinction between cases of sales as such and cases of charges for labour and work. The entries in the books and the bills issued show that there was no agreement or intention to sell movables, *e.g.*, the king-pin bushes as such while charging for the repair of the car. In the circumstances it should be held that the charges for the fabricated materials should be treated as charges in respect of the works contract and not independent sales of those materials. The result is that subject to the liability of the petitioner in regard to parts supplied and in respect of which tax was levied on the customers and the tax on such taxes collected, there is no other liability on the part of the assessee in regard to the workshop transactions.

Thus in relation to the assessment year 1949-50 (T.R.C. 233 of 1956) no portion of the disputed turnover, Rs. 2,16,550 is liable to be taxed, neither Rs. 1,27,765, which represented only labour charges, nor Rs. 73,627 which represented contracts which did not involve any sale of spare parts *separatim*, nor Rs. 15,158, which represented the value of what has been referred to as the 'fabricated' parts.

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1. 9 S.T.C. 388.

The assessments of the other years, 1950-51, 1951-52, and 1952-53 also will have to be revised by the Tribunal on the same lines.

The Revision Cases are allowed to the extent indicated above, with costs in one, T. R. C. No. 233 of 1956 C.F. Rs. 250.

R.M. ——— *Revision cases allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE BALAKRISHNA AYYAR.

V. Ramaswami Naidu and another .. *Applicants**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), section 4—Total income of assessee—'Income' and 'income accruing or arising'—What amounts to—Ceylon Income-tax Ordinance, section 43—Company deducting certain amount from the shareholder's dividend and retaining to itself—Such deducted amount if income of the shareholder assessee.

Under section 43 of the Ceylon Income-tax Ordinance a company is entitled to deduct from the dividends payable to its shareholders a tax at twice the unit rate which it can keep for itself and is not bound to pay it over to the Government. A shareholder in India of a Ceylon Company from whose dividends the company has deducted such amounts cannot be said to be in receipt of that sum as part of his income.

Income under the Indian Income-tax Act implies the idea of receipts of money, actual or constructive. The policy of the Act is to make an income taxable when it is paid or received either actually or constructively. In the instant case the amount deducted by the Ceylon Company is not received by the assessee. It cannot also be said to be 'income accruing or arising' as the assessee has no right to recover the same at any time. It is the property of the company and forms part of its general funds. Hence such amounts cannot be included in the taxable income of the assessee.

Jolly v. *Federal Commissioners of Taxation*, 50 C.L.R. 131 and *Newman* v. *Commissioner of Inland Revenue*, 18 T.C. 333 and *Home Grown Sugars Ltd.*, In re, L.R. (1938) 1 Ch. 219, referred.

Case-law reviewed.

Case referred to the High Court by the Income-tax Appellate Tribunal, under section 66 (1) of the Indian Income-tax Act (XI of 1922), as amended by section 92 of the Income-Tax (Amendment) Act, (VII of 1939), in 66 R.A. Nos. 665 and 664 (Madras) of 1953-54 on its file for decision on the following questions of law, *viz.*

"Whether the assessment of the gross income from the investment in the aforesaid foreign company before deduction of the Ceylon income-tax thereon, as having accrued in full, is valid and proper"?

S. Swaminathan, for Applicants.

C. S. Rama Rao Sahib, for Respondent.

The Judgment of the Court was delivered by

Balakrishna Ayyar, J.—Under section 66 (1) of the Income-tax Act the Income-tax Appellate Tribunal of Bombay has referred the following question for the decision of this Court :

"Whether the assessment of the gross income from the investment in the aforesaid foreign company, before deduction of the Ceylon income-tax thereon, as having accrued in full, is valid and proper"?

The material facts are these: V. Ramaswami Naidu, the Kartha of a Hindu undivided family, held in the names of various members of the family 10,208 shares of Rs. 10 each in Agravas Estates, Limited, a company incorporated in Ceylon. For purposes of the Indian Income-tax Act this company is a foreign company. G. V. Govindaswami Naidu, another assessee, and, his wife Govindammal, held 10,000 shares in the same company between them. At a meeting of the general body of shareholders of this company held on 11th November, 1950, certain dividends were declared and subsequently paid in the manner and to the extent indicated below :

*Case Ref. No. 27 of 1954. 7th July, 1958.
(16th Asadha—1880 Saka).

(1)	*Gross dividends.* (2)	*Ceylon income-tax deducted.* (3)	*Net dividends.* (4)	*Dividend certificates annexures.* (5)
	Rs.	Rs.	Rs.	
Ramaswami Naidu (Hindu undivided family) ..	26,270	8,024	18,246	" A-1, A-2 and A-3."
Govindaswami Naidu ..	25,000	7,375	17,625	" B-1 and B-2 ".

The previous year of these two assessees was the Tamil year ended 13th April, 1951. For the assessment year 1951-52 the Income-tax Officer assessed the gross amounts of the dividends ignoring the Ceylon income-tax that had been deducted therefrom. The assessees contended before the Appellate Assistant Commissioner that it was only the net dividend that was assessable. The Appellate Assistant Commissioner, however, confirmed the orders of the Income-tax Officer. The assessees then went up to the Income-tax Appellate Tribunal. By its orders made on 22nd July, 1953, the Tribunal found—we are now quoting from paragraph 8 of the letter of reference :—

> " that the income in question did not call for consideration as ' dividends ' as the aforesaid foreign company was not registered under the Indian Companies Act, and generally did not fall within the scope of sections 2 (6), 2 (6) (*a*) and 16 (2) of the Income-tax Act but only as income from a foreign investment, there was no provision in the Ceylon Income-tax Ordinance which distinguished the position of the tax deducted at source from dividends from that envisaged in the scheme of the Indian Income-tax Act and that under both the enactments, the tax deducted was deemed to be credited to the assessee and paid on his account."

On this reasoning the Tribunal rejected both the appeals.

The assessees then applied to the Tribunal that the question of law arising out of their contention be referred to this Court. The Tribunal agreed that a point of law arose and hence referred the question to this Court.

Certain provisions of the Ceylon Income-tax Ordinance must now be referred to. Sub-section (7) of section 20 of the Ordinance directs that upon the taxable income of every company, tax shall be charged at the rates specified therein. Section 43 (1) entitles every resident company to deduct from the amount of any dividend which becomes payable during a year of assessment to any shareholder, tax at twice " the unit rate " in force for the year preceding the year of assessment in which such dividend becomes payable. Under the second proviso to this sub-section the Commissioner is empowered to give notice in writing to the company that in respect of the dividends payable to a particular shareholder, tax at a greater rate than twice the unit rate shall be deducted. On receipt of such notice the company is bound to deduct tax from all dividends paid to the particular shareholder at the rate mentioned in the notice. The proviso continues,

> " the tax so deductable in excess of tax at twice the unit rate shall be a debt due from the company to the Government of Ceylon and shall be recoverable forthwith as such, or may be assessed and charged upon the company in addition to any other tax otherwise payable by it."

The position therefore is this. On its income a company resident in Ceylon pays income-tax just like any individual. But, it is entitled to deduct from the dividends payable to a shareholder tax at twice the rate. The company is entitled to keep for itself the tax it has so deducted and it is not bound to pay it over to Government. It is only tax which it deducts at a rate, higher than twice the unit rate in pursuance of a notice issued by the Commissioner that it is bound to pay over to Government.

Sub-section (2) of section 43 requires every person who issues a warrant or cheque or order for payment of the money relating to a dividend, to annex thereto a statement in writing showing

> " (*a*) the gross amount which after deduction of the tax appropriate thereto corresponds to the net amount actually paid ;
>
> (*b*) the rate and the amount of tax appropriate to such gross amount ; and
>
> (*c*) the net amount actually paid."

Sub-section (3) reads :

> " Where the assessable income of a person includes a dividend from a resident company paid in the form of money or of an order to pay money, he shall be entitled on production of a statement relating to such dividend made in accordance with sub-section (2), to a set-off against the tax payable by him, of the amount of tax shown on such statement."

Section 49 of the Ordinance provides for what we call the grossing up of the income from dividends.

It is thus seen that the amount of Rs. 8,024 which the company deducted from the dividend warrant of Ramaswami Naidu and the amount of Rs. 7,375 which it deducted from the dividend warrant of Govindaswami Naidu were moneys which it was entitled to retain for itself and which it was not bound to pay over to the Ceylon Government.

These provisions of the Ceylon Income-tax Ordinance merely incorporate the appropriate provisions of the English law on the subject.

An exposition of the history of this part of the law is to be found on pages 358 to 360 of the case reported in *Neumann* v. *The Commissioners of Inland Revenue*[1] :

> " The relative positions of a company and the shareholders of the company in relation to income-tax under the Income-tax Acts have always been recognised as special in character. It was never, I think, doubted that, under the Act of 1842, the profits of a business carried on by a company were taxable against the company under Schedule D, and were not taxable again, after distribution, in the hands of the share-holders under Schedule D or any other schedule. At the same time, it was permissible to the company, under section 54 of the Act of 1842, to deduct from the dividend the proportionate part of the tax paid to the tax collector, and the shareholders entitled to exemption from or abatement of income-tax could, upon the footing of the deduction obtain the necessary return of tax. I cannot but think that the position under the Act of 1842 upon its proper construction is correctly described in the following passage from the speech of Lord Phillimore in *Bradbury* v. *English Sewing Cotton Company, Limited*[2] : ' A joint stock company is under the Income-tax Act, 1842, treated as a person and is directed to make a return of its profits or gains according to Schedule D upon a conventional figure, arrived at by taking an average of the three preceding years, and is liable to be assessed and taxed thereupon.
>
> If the principle of its being a distinct person, distinct from its shareholders or the aggregate of its shareholders, had been carried to a logical conclusion, there would have been no reason why each shareholder should not, in his turn, have to return as part of his profits or gains under Schedule D, the money received by him in dividends.
>
> Their taxation would seem to be logical but it would be destructive of joint stock company enterprise, so the Act of 1842 has, apparently proceeded on the idea that for revenue purposes a joint stock company should be treated as a large partnership, so that the payment of income-tax by a company would discharge the quasi-partners. The reason for their discharge may be the avoidance of double taxation, or to speak accurately, the avoidance of increased taxation. But the law is not founded upon the introduction of some equitable principle as modifying the statute ; it is founded upon the provisions of the statute itself ; and the statute carried the analogy of a partnership further for it contemplates a company declaring a dividend on the gross gains, and then on the face of the dividend warrant making a proportionate deduction in respect of the duty, so that the shareholder whose total income is so small that he is exempt from income-tax or pays at a lower rate, can get the income-tax which has been deducted on the dividend warrant returned to him.'
>
> In practice, the matter did not work out quite so simply. It has to be remembered that the amount distributable in dividend in any year might, in view of the assessment of profits or gains under Schedule D being upon the basis of the average of the three preceding years, as it then was, be much more or much less than the amount of the assessment for that year, so that if this proportionate deduction was treated as meaning the rateable proportion of the tax paid by the company in respect of the year of distribution, it might much exceed or be much less than the amount which would be deducted from the dividend if the current rate of tax in respect of the gross dividend had been deducted. At any rate, a practice seems to have grown up of companies deducting from dividends tax appropriate to the amount of the dividend at the current rate of tax, quite irrespective of the amount of tax paid by the company to the Revenue, and of the shareholders claiming exemption or abatement being treated by the Revenue as having paid tax to the extent of that deduction. As the company making the deduction lay under no obligation to pay to the Revenue anything more than the tax based upon its own assessment, the result was that the tax returned to those claiming exemption or abatement could rarely, if ever, have had any exact relation to the amount of tax received by the Revenue from the recipient of returned tax."

Section 43 of the Ceylon Ordinance merely incorporates the provisions of Rule 20 of the General Rules applicable to Schedules A, B, C, D and E of the English Act.

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1. 18 T.C. 333.
2. L.R. (1923) A.C. 744 at p. 769.

The question we have to decide is whether the two sums of Rs. 8,024 and Rs. 7,375 which the company deducted in the circumstances already mentioned, are liable to be included for purposes of Indian income-tax in the income of the assessees. Under section 4 of the Indian Income-tax Act, the total income of an individual who is resident in the taxable territories includes,

> " all income profits and gains (*a*) which are actually received or deemed to be received in the taxable territories, (*b*) which accrue or arise or are deemed to accrue or arise in the taxable territories, and,
>
> (*c*) which accrue or arise without the taxable territories.

The other provisions of the section are not here material. It is nobody's case that these two amounts were at any time received either by Ramaswami Naidu or by Govindaswami Naidu. Nor do we think that it can be properly said that these amounts " accrued or arose " to those individuals. There is a clear explanation of the subject on pages 49 to 51 in *E. D. Sasson & Co., Ltd.* v. *Commissioner of Income-tax, Bombay City*[1].

The Privy Council in *Commissioner of Income-tax, Bengal* v. *Shaw Wallace & Co.*[1], attempted a definition of the term ' income ' in the words following :—

> " Income, their Lordships think, in the Indian Income-tax Act, connotes a periodical monetary return ' coming in ' with some sort of regularity, or expected regularity from definite sources. The source is not unnecesarily one which is expected to be continuously productive, but it must be one whose object is the production of a definite return, excluding anything in the nature of a mere windfall."

Mukerji, J., has defined these terms in *Rogers Pyatt Shellac & Co.* v. *Secretary of State for India*[3].

> " Now what is income ? The term is nowhere defined in the Act ....In the absence of a statutory definition we must take its ordinary dictionary meaning—' that which comes in as the periodical produce of one's work, business, lands or investments (considered in reference to its amount and commonly expressed in terms of money) ; annual or periodical receipts accruing to a person or corporation (Oxford Dictionary). The word clearly implies the idea of receipt, actual or constructive. The policy of the Act is to make the amount taxable when it is paid or received either actually or constructively. ' Accrues ', ' arises ' and ' is received ' are three distinct terms. So far as receiving of income is concerned there can be no difficulty ; it conveys a clear and definite meaning, and I can think of no expression which makes its meaning plainer than the word ' receiving ' itself. The words ' accrue ' and ' arise ' also are not defined in the Act. The ordinary dictionary meanings of these words have got to be taken as the meanings attaching to them. ' Accruing ' is synonymous with ' arising in the sense of springing as a natural growth or result. The three expressions ' accrue ', ' arises ' and ' is received ' having been used in the section; strictly speaking ' accrues ' should not be taken as synonymous with ' arises ' but in the distinct sense of growing up by way of addition or increase or as an accession or advantage; while the word 'arises' means comes into existence or notice or presents itself. The former connotes the idea of a growth or accumulation and the latter of the growth or accumulation with a tangible shape so as to be receivable. It is difficult to say that this distinction has been throughout maintained in the Act and perhaps the two words seem to denote the same idea or ideas very similar, and the difference only lies in this that one is more appropriate than the other when applied to particular cases. It is clear, however, as pointed out by Fry, L.J., in *Colquhoun* v. *Brooks*[4], (this part of the decision not having been affected by the reversal of the decision by the House of Lords) that *both the words are used in contradistinction to the word ' receive ' and indicate a right to receive.* They represent a state anterior to the point of time when the income becomes receivable and connote a character of the income which is more or less inchoate.
>
> One other matter need be referred to in connection with the section. What is sought to be taxed must be income and it cannot be taxed unless it has arrived at a stage when it can be called 'income '."

The observations of Lord Justice Fry quoted above by Mukerji, J., were made in *Colquhoun* v. *Brooks*[4], while construing the provisions of 16 and 17 Victoria Chapter 34, section 2, Schedule ' D '. The words to be construed there were " profits or gains, arising or accruing " and it was observed by Lord Justice Fry at page 59 :—

> "In the first place, I would observe that the tax is in respect of 'profits or gains arising or accruing.' I cannot read those words as meaning ' received by '. If the enactment were limited to profits and

1. (1954) 26 I.T.R. 27 : (1954) S.C.J. 771.
2. (1932) I.L.R. 59 Cal. 1343 at 1352 : L.R. 59 I.A. 206.
3. (1925) 1 I.T.C. 363 at 371.
4. (1888) L.R. 21 Q.B.D. 52 at 59.

gains 'received by' the person to be charged, that limitation would apply as much to all Her Majesty's subjects as to foreigners residing in this country. The result would be that no income-tax would be payable upon profits which accrued but which were not actually received, although profits might have been earned in the kingdom and might have accrued in the kingdom. I think, therefore, that *the words ' arising or accruing ' are general words descriptive of a right to receive profits.*"

To the same effect are the observations of Satyanarayana Rao, J., in *Commissioner of Income-tax, Madras* v. *Anamallais Timber Trust Ltd.*[1], and Mukherjee, J., in *Commissioner of Income-tax, Bombay* v. *Ahmedbhai Umarbhai & Co., Bombay*[2], where this passage from the judgment of Mukerji, J., in *Rogers Pyatt Shellac & Co.* v. *Secretary of State for India*[3], is approved and adopted. It is clear therefore that income may accrue to an assessee without the actual receipt of the same. If the assessee acquires a right to receive the income, the income can be said to have accrued to him though it may be received later on its being ascertained. The basic conception is that he must have acquired a right to receive the income. There must be a debt owed to him by somebody. There must be as is otherwise expressed *debitum in praesenti solvendum in futuro*; see *W. S. Try Ltd.* v. *Johnson (Inspector of Taxes)*[4], and *Webb* v. *Stenton and others, Garnishees*[5]. Unless and until there is created in favour of the assessee a debt due by somebody it cannot be said that he has acquired a right to receive the income or that income has accrued to him.

The two amounts we are concerned with were always the property of the company. At no point of time did the title to these amounts vest in the assessees. At no point of time could the assessees have said that it was their money. Regard being had therefore to the meaning of the words " income ", and " accrue " used in the Indian Income-tax Act these amounts are not, in our opinion, liable to be included in the income of the assessees for purposes of the tax.

We find that a view similar to ours was taken in *Jolly* v. *Federal Commissioner of Taxation*[6], which is a case decided by the High Court of Australia under provisions substantially the same. We extract the relevant passages :

"A governing principle of British Income-tax Law is taxation at the source, and, in accordance with this principle, the profits and gains of a body of persons, an expression which includes a joint stock company, are brought into charge before they are divided, and the body of persons paying a dividend is entitled to deduct the tax appropriate thereto (rule 20 of the All Schedules Rules, Income-tax Act, 1918). When a company declares a tax free dividend, it is regarded, at any rate for any purposes, as dividing profits sufficient in amount to pay a gross dividend which, after deduction of tax, will leave the net amount at which the dividend is expressly declared.

* * * * *

The system, however, of taxation at the source involves a treatment of corporate profits which is not compatible with any general inclusion of dividends in the shareholder's own assessment to income-tax. The profits and gains are assessed in the hands of the company prior to distribution. They are taxed collectively. Upon distribution the company is authorized, but not required, to deduct from the dividend the tax which would be payable upon the dividend. The company does not account to the Crown for the amount deducted ; for the profits distributed have already borne tax in its hands. But, for the purposes of reliefs allowed to tax payers, the shareholder is entitled to treat himself as having paid by deduction the amount which the company has withheld in paying his dividend ; and in assessing his liability to super-tax or surtax, which is levied on his total income from all sources, the amount so withheld as well as the dividend must be included.

* * * * *

The question whether the shareholder obtains immunity from taxation by direct assessment if, and only if, he suffers a deduction in respect of tax from the dividend, appears to me to be of some importance in relation to the question whether the actual or imputed deduction made should be considered dividend or profit credited or paid to the shareholder within the meaning of section 14 (*b*) of the Commonwealth Income-tax Assessment Act, 1915-1921. Unless this be so, I think the remaining incidents of the relation of the shareholder to the gross amount, actual or notional, of the dividend are against the view that the excess over the amount he receives is credited or paid to him. That excess the company is by law entitled to withhold whether it is included within, or excluded from, the amount of the dividend expressly declared. *When the company retains such a sum, it forms part of its general funds and is applicable accordingly. The fact that it specifies in its declaration of dividend a larger sum*

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1. (1950) 18 I.T.R. 333 at 342 : A.I.R. 1951 Mad. 551.
2. (1950) S.C.J. 374 : 1950 S.C.R. 335 at 389 : 18 I.T.R. 472.
3. (1925) 1 I.T.C. 365 at 372.
4. (1946) 1 All E.R. 532 at 539.
5. L.R. (1883) 11 Q.B.D. 515 at 522, 527.
6. 50 C.L.R. 131.

or rate than it in fact pays, does not seem of importance. In point of law it incurs no liability to the shareholder by doing so for any amount except the net sum after the deduction. Whether it be correct or not, that before section 7 of the Finance Act, 1931, the company was authorized to make a deduction from dividends out of profits on which the company paid no tax (*see* per Romer, L.J., in *Neumann's case*[1]), it is clear that deduction of tax did not operate by way of set-off or otherwise to discharge any liability for any sum paid by the company for tax. *There is no appropriation to or for the use of the shareholder ; nothing done by the company on his account or for his use.* If it be true the shareholder's immunity from direct assessment depends upon his suffering a deduction from dividend, all that can be said is that, by making the deduction, the company *ipso facto* discharges or absolves the shareholder from a direct liability to the Crown for tax in respect of the dividend. I do not think that in the peculiar situation in which the shareholder stands this would be enough to constitute a credit to him of the profits within section 14 (*b*) as construed in *Webb's case*[2] and *James's case*[3]. The destruction or prevention of the shareholder's liability to tax would be a consequence ensuing from the deduction as a result of an express provision of positive law, a statutory phenomenon, and not a discharge by payment or appropriation of money for the purpose. The money would not be credited to the taxpayer and applied by the company in discharge of his liabilities."

The learned Judge finally expressed this conclusion :

" In my opinion no more than the net amount paid to the taxpayer by the company in respect of dividends on preference or on ordinary stock was credited or paid to him. *He is not liable to the inclusion in his assessment of any greater amount of dividend.*"

The treatment of the matter by Dixon, J., was so comprehensive that on appeal from his decision the learned Judges contended themselves with this statement :

" In this case the appeal will be dismissed."

To the same effect is the decision in *Home Grown Sugar Ltd.*, In re[4]. At page 227 Simonds, J., observed :

" Apart, however, from this consideration, it appears to me reasonably clear that the amount of dividend received by a shareholder within the meaning of this clause is that sum which he actually receives after the company has exercised the right to deduct the appropriate amount of tax, which is given to it by rule 20 of the All Schedules Rules of the Income-tax Act, 1918.

* * * * *

But it does not, in my view, follow that the shareholder is, for the purpose of such an article as this, to be regarded as receiving what he does not in fact receives. Such a contention would be weightier if the shareholder, being entitled to receive the whole dividend, directed the company to pay the appropriate part of it as income-tax on his behalf. But that is not the position. Indeed, so far as it from being the position that the company itself decides whether it will or will not deduct tax from dividend, and will be guided in the amount of dividend which it declares by its decision to deduct or not to deduct tax."

Similar views were expressed in *Cull* v. *Inland Revenue Commissioners*[5]. At page 4, Lord Atkin observed :

" It is now clearly established that in the case of a limited company the company itself is chargeable to tax on its profits, and that it pays tax in discharge of its own liability and not as agent for its shareholders. The latter are not chargeable with income-tax on dividends, and they are not assessed in respect of them.

* * * * *

" The Crown contended that this sub-section (section 7 (2) of the Finance Act, 1931) on its true construction applied to all cases where a deduction was authorised to be made and was not confined to those in which a deduction had actually been made. In their submission, it, therefore, for the purpose of income, imputed to the person receiving a payment in cases where no deduction had in fact been made the receipt of a hypothetical sum calculated as though deduction had been made ; what is now known in income-tax slang as ' grossing up '. Whatever might have been said for this construction before 1934, it is impossible now to accept it, for by the decision of this House in *Neumann* v. *Inland Revenue Commissioners*[6], it was expressly held to be wrong."

The same view was taken by the Calcutta High Court in *Angus Co. Ltd., Calcutta* v. *Commissioner of Income-tax*[7], where the learned Chief Justice observed :

" To my mind, the one fact which seems to remove all doubts as to the true character of the payment of the tax of Rs. 70,313 is that the company did not have to pay it and did not in fact pay it, because it declared the dividend, but would have to pay it as a part of the charge on its own profits,

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1. L.R. (1933) 1 K.B. at 747, 749.
2. (1922) 30 C.L.R. 450.
3. (1924) 34 C.L.R. 404.
4. L.R. (1938) 1 Ch. 219.
5. Supplement to (1939) I.T.R. Vol. VIII, page 1.
6. (1934) 103 L.J.K.B. 210.
7. (1953) 25 I.T.R. 431 at 445.

in any event, whether it declared any dividend or not. The payment was therefore not on account of the declaration of the dividend and it was not by reason of the declaration that the funds of the company were depleted to the extent of Rs. 70,313,"

Section 18 of the Indian Income-tax Act requires every person responsible for paying salaries to deduct at the time of payment, income-tax and super-tax at certain rates to be ascertained. The money so deducted never comes into the hands of the employee. Nevertheless it is treated for purposes of tax as part of the salary. The amount deducted by the company from the gross dividend of the assessees must, argued Mr. Rama Rao Sahib, be regarded in the same way. We are unable to agree that the positions are similar. The money which the person charged with disbursing salaries is required to deduct on account of income-tax and super-tax is really the money of the assessee. But, in the case of the present assessees Ramaswami Naidu and Govindaswami Naidu, the amounts which Agravas Estates Ltd., retained in their hands were always the money of Agravas Estates Ltd. and at no time became the money either of Ramaswami Naidu or Govindaswami Naidu.

Another point of difference is this : the person disbursing a salary is under a duty to deduct the tax, but under section 43 of the Income-tax Ordinance the company was under no such obligation. It had a right to deduct but it was not under an obligation to do so.

Thirdly, a person deducting income-tax and super-tax from any salary is bound to pay the money so deducted to Government. But, Agravas Estates Ltd., was entitled to keep the moneys it deducted. It is true that the company was bound to show the amount it deducted in the dividend warrants which it issued, but that is only for the purpose of explaining how the final figure was obtained. The obligation of the company to exhibit in the dividend warrants the arithmetic of the processes involved does not have the effect of making the moneys it did not pay, the moneys of Ramaswami Naidu or Govindaswami Naidu.

Be it remembered that when a company pays income-tax on its profits is does not do so as an agent of the shareholder. *See* Article 24 in Volume III of Simonds Income-tax, 2nd edition :

" *Taxation of companies, etc.*—A company is charged to tax on the full amount of its profits or gains, before the payment of any dividend in respect of any share, right or title thereto, computed in accordance with the provisions of the Income-tax Acts. A company pays income-tax on its profits as being itself a tax-payer, not as agent for its shareholders ; if no dividend is declared by the company, the shareholders are not concerned with the payment of tax."

In support of his argument that the amounts Rs. 8,024 and Rs. 7,375 retained by Agravas Estates Ltd., must be deemed to be the income of the assessees Ramaswami Naidu and Govindaswami Naidu, Mr. Rama Rao Sahib referred to the decision in *Sir Joseph Kay* v. *Commissioner of Income-tax, Bombay City*[1]. The relevant facts there were as follows : Sir Joseph Kay, the assessee, was entitled to receive from three insurance companies in the United Kingdom annuity amounting to £500 a year. The insurance companies deducted income-tax under the English Income-tax Act, 1918, at the standard rate amounting to £275. The assessee was paid only £225. The assessee contended that only the sum of £225 which he actually received should be included in his total income. The department thought that the whole of the £500 should be included even though he had not received £275, and, the question was whether the sum of £500 or the sum of £225 alone should be included in the assessee's total income. The Court held that the whole of the amount of £500 ought to be included in the assessee's total income.

It seems to us that this decision which relates to an annuity cannot be applied to the case of dividends. An annuity, if it resembles anything at all, resembles a salary or a pension and, the amount deducted from an annuity on account of tax, must be treated in the same way as an amount deducted from a salary or pension on account of income-tax, We do not consider that the decision cited by Mr. Rama Rao Sahib is applicable.

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1. (1955) 29 I.T.R. 774.

In the result, we hold that the amounts of Rs. 8,024 and Rs. 7,375 cannot be included in the taxable income of the assessees. These amounts were never received by the assessees, at no time did the amount accrue or arise to the assessees ; at no time actually or notionally were the money the income of the assessees in any sense of that word.

The question is answered in favour of the assessees. Assessee will pay the cost. Counsel's fee Rs. 250.

R.M. ——— *Reference answered in favour of the assessee.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE GANAPATIA PILLAI.

M. K. Manickam Chettiar .. *Appellant**

v.

The Union of India by General Manager, Southern Railway, and another .. *Respondents.*

Railways Act (IX of 1890), *section* 74-*A—Goods consigned at owner's risk—Duty to take care—Onus of proof of negligence.*

The measure of responsibility of bailees as laid down in section 151 of the Contract Act, *i.e.*, to take reasonable care of the goods entrusted to them applies to the Railway Administration in this country. It is, of course, open to the Railway Administration under section 72 of the Railways Act to delimit their responsibility by a special contract where goods are sent at owner's risk. Section 74-A of the Act casts the onus of proof of negligence or misconduct on the part of the railway on the plaintiff only in two cases, *viz.*, when the goods are in a defective condition as a result of which they are liable to deteriorate and where the packing of the goods are defective. In all other cases the primary onus of a bailee to show that he has taken reasonable care of the goods, is on the railway.

Appeal against the decree of the Court of the Subordinate Judge of Kumbakonam in Original Suit No. 56 of 1953.

R. Gopalaswami Ayyangar, for Appellant.

S. S. Ramachandra Ayyar, for Respondent.

The Judgment of the Court was delivered by

Ganapatia Pillai, J.—This appeal is preferred by the plaintiff in O.S. No. 56 of 1953 on the file of the Subordinate Judge, Kumbakonam, against the decree dismissing that suit. The respondents are the Union of India, represented by the General Manager, Southern Railway, and the General Manager, Central Railway.

The appellant who is a trader in coriander seeds claimed Rs. 14,659-1-6 and interest at 6 per cent. per annum on this amount from 23rd January, 1951 to 3rd December, 1951. The plaint was originally presented to the Court of the Subordinate Judge, Tanjore, under the following circumstances. In December, 1950, the plaintiff instructed one Motilal Madan Mohan of Bidar in the old Hyderabad State to purchase for him 300 bags of *dhania* and despatch them by rail to Mannargudi. Accordingly, 300 bags were loaded by the broker Motilal Madan Mohan, on 25th December, 1950, at Bidar station in the broad gauge wagon No. G.I.P. 22315. The railway receipt No. 13205 obtained for the goods was endorsed over to the plaintiff for taking delivery of the goods at Mannargudi. The metre-gauge wagon in which the goods were sent to Mannargudi arrived at that station on 12th January, 1951. On opening the wagon, the clerk of the plaintiff found that almost all the bags had been damaged by rain water. He therefore refused to take delivery, and, on instructions from him, the plaintiff wired the General Traffic

*Appeal No. 388 of 1954. 25th September, 1958. (3rd Asvina 1880 Saka.)

Manager, Southern Railway, asking for open delivery. Open delivery was given on 20th January, 1951, when it was found that only 75 bags out of the consignment of 300 were in a sound condition and the remaining 225 bags were found damaged, mildewed, caked and darkened in colour. The officer of the railway who gave open delivery certified that these 225 bags were damaged to the extent of 90 per cent. of the value of the goods. The plaintiff was therefore able to sell only the seventy-five sound bags at the current market rate ; and out of the remaining damaged bags, he was not able to sell 20 bags and the remaining bags were sold for less than 10 per cent. of the ruling market price. The cost of the consignment to the plaintiff amounted to Rs. 22,102-12-6, which works out at the rate of Rs. 73-10-10 per bag. By sale of the damaged, 225 bags, the plaintiff suffered loss of Rs. 13,837-8-0. To this, the plaintiff added the cost of 200 gunny bags at Rs. 200. The total loss of 20 bags is assessed by the plaintiff at Rs. 1,500 at the market rate at Rs. 75 per bag. The total damages suffered by the plaintiff amounted to Rs. 15,537-8-0 but the claim for damages made in the plaint is limited to Rs. 14,659-1-6.

The railway administration denied liability for the damage, though the extent of the damage was not disputed by them. They disputed the amount claimed for damages and also the interest claimed on this amount. They denied that there was any negligence on the part of the railway staff in dealing with this consignment. They affirmed that the consignment was carried with all care and caution required under law.

The following issues were framed by the learned Subordinate Judge :—

(1) Whether defendant-company took all possible care for the transport of the goods in question and whether they are not liable for any damages ?

(2) Whether the damages caused to the coriander bags arose in transit on account of the carelessness or negligence on the part of the defendant-company ?

(3) Whether there was any delay in the despatch of the goods as alleged by the plaintiff ?

(4) To what damages, if any, is the plaintiff entitled ?

Under Issues 1 and 2, the learned Subordinate Judge came to the conclusion that the defendant-railway was not liable, though he expressed this conclusion in a halting manner. This will be seen from the following observations of the learned Subordinate Judge :

" In this case, even though I find it difficult to agree wholly with the defendant-railway when the defendant railway says that the wet condition of prematurely cut coriander crops, because there was a heavy demand for coriander in 1950 December, in the market, was wholly responsible as the coriander had caked and sprouted, and such a serious condition might not be wholly due to the inherent defect of wet and prematurely cut crops as stated by P.W. 5, yet, as the wagon appears to have been water-tight, so that P.W. 3, a witness for the plaintiff himself, was prepared to immediately (on 13th January, 1951 itself) load a consignment of paddy into it in view of the certificate of D.W. 14, I think the defendant-railway cannot be mulcted by way of damages on account of any negligence, if, due to very heavy rains of exceptional virulence, any water found its way into the wagon, notwithstanding the wagon being water-tight ".

From this involved sentence, we are able to gather that the learned Judge did not believe the allegation of the defendant-railway that the damage was caused by the wet condition of the goods even at the time when they were loaded into the railway wagon at Bidar. The learned Subordinate Judge was also satisfied that the cause of the damage was rainwater getting into the railway wagon. At any rate, we take it he means that the metre-gauge wagon in which the goods were carried from Arkonam to Mannargudi was not leaky though not rainproof. Yet, the learned Judge found that the railway could not be mulcted with damages, because negligence had not been proved, though the learned Judge was satisfied that the goods were damaged by very heavy rains of exceptional virulence even though the wagon was water-tight. We may straightaway say that there was evidence in the case only to show that the metre-gauge wagon which carried the goods to Mannargudi was alone tested and was found by a railway official to be water-tight. The learned

Judge had obviously overlooked the fact that even when the goods were transhipped at Arkonam from the broad gauge wagon to the metre gauge wagon, damage to about 223 bags was noticed. There was no evidence in the case to show that any exceptional rains of a virulent type had occurred along the route from Bidar to Arkonam, and the evidence only showed that such rains occurred at Tiruvarur and Mayavaram during the journey from Arkonam to Mannargudi.

Another conclusion of the learned Judge on this part of the case is thus expressed :—

" In this view, it is unnecessary to consider whether the plaintiff was guilty of any ' contributory negligence ' as the consignor (P.W. 4) does not seem to have sent the goods in a very dried condition, but seems to have sent somewhat wet goods purchased in a hurry to make up the deficiency between 300 bags required repeatedly by the plaintiff, and only 84 old bags that were available with P.W. 4 by 22nd December, 1950 ".

This finding is in direct contradiction to the first finding mentioned above, in which the learned Judge had expressed his opinion that he was not prepared to agree with the contention of the railway that 300 bags were loaded in a wet condition or they consisted of prematurely cut coriander crops. This confusion in the mind of the learned Subordinate Judge makes it incumbent upon us to examine the evidence in detail to find if his ultimate conclusion that the defendant-railway was not liable for the damage could be accepted.

Many of the facts are not in dispute. The consignment was loaded by the Bidar merchant in G.I.P. wagon No. 22315 at Bidar station on the Central Railway on 25th December, 1950. This wagon arrived at Arkonam on 4th January, 1951 with the forwarding Station Master's seals intact. The consignment was transhipped at Arkonam junction into the metre-gauge wagon BCC 338. At that time, it was noticed that about 233 bags were wet and dry (we are borrowing the language of the clerk who was in charge of the transhipment at Arkonam in thus describing the condition of the bags. This cryptic description is elaborated in the evidence of D. W. 9 the transhipment clerk at Arkonam, in the following manner :—

" 233 bags were wet. Bags were glued to one another as it were. That is what I meant by ' caked '. I have no reason to know if rain water would have caused the damage to the goods. Except 213 bags, the rest were sound and quite all right ".

Neither this clerk nor the goods clerk at Mannarguddi noted the position of the undamaged bags in relation to the damaged bags as they were bound to note under the rules. But there is the evidence of P. W. 2, the clerk of the plaintiff, who was present at Mannargudi at the time when the goods were unloaded, and also of P. W. 3 a railway broker, to show both the condition of the damaged bags and the position which they occupied in the wagon. According to them, 75 bags lying in between the bags at the top and those at the bottom were in sound condition. D.W. 12, the Goods Clerk at Mannargudi railway station, has admitted that the bags were wet, and that, on touching them, one's hands became wet with water. This was the Goods Clerk who unloaded the wagon, in which the suit consignment was received at Mannargudi station. P. W. 6 was the Chief Goods Clerk of that station at that time. But as some allegations have been made against him on the score that he was facing a charge of corruption, we do not place any reliance on his evidence, which is wholly in favour of the plaintiff's contention.

The Station Master of Mannargudi, D. W. 13, was present at the platform when the goods were unloaded. He describes the condition of the wagon and bags thus :

" When I saw, no water came out of the wagon ; nor did any water ooze out of damaged goods. The flooring of the wagon and the damaged bags were damp ".

To a specific question whether the damaged goods looked like soaked in water, this witness answered thus :

"The bags were wet, not drenched by water or soaked in water. All the damaged bags were wet."

Yet, according to this witness, he sent a message to be on the safe side, though it was obligatory on his part to send messages only in case there was leakage in the roof or sides of the wagon. The report (Exhibit A-9) of the responsible officer of the railway who was present to give open delivery shows that almost all bags were wet by water and stained. He assessed 75 bags as sound, and the rest of the consignment, according to him, was found to be damaged, mildewed and caked darkened in colour. He assessed the damage at 90 per cent.

Two things stand out prominently from this evidence. First, if partially dried crops, or, in other words, crops which were not fully dried, had been sent from Bidar, one would expect the condition of all the bags to be the same ; that is to say, if the seeds had sprouted or caked, all the bags should have suffered this damage. Secondly, the fact that 75 bags were in a sound condition unaffected by water leads to the inference that the damage was caused by water arising from an extraneous source and not present in the seeds themselves when loaded.

We now go to the question whether partially dried crops were sent by the Bidar merchant. This finding of the learned Subordinate Judge is based upon the sole circumstance that, because of heavy demand for coriander in December, 1950. P.W. 4 the Bidar merchant, had not sufficient stock by 22nd December, 1950, and was therefore forced to send, in a hurry, goods which were not completely dry. It is true that, on 18th December, 1950, P. W. 4 had only a stock of 84 bags on hand, which represented the residue of goods already purchased. But the learned Subordinate Judge is wrong in observing that P. W. 4 admitted that, on 22nd December, 1950, he had a stock of only 84 old bags. In cross-examination, P.W. 4 stated thus : At close of 18th December, 1950, 84 bags were on hand. On 22nd December, 1950, he had a stock of 467 bags on hand, out of which 306 bags had been despatched on 23rd December, 1950. On 19th December, 1950, 664 bags had been despatched. Thus, after 18th December, 1950, nearly 1000 bags had been purchased and despatched . On 23rd December, 1950, this witness purchased 213 bags. Thus, the old stock available on the 23rd of December before the purchase of 213 bags amounted to at least 195 bags. This and the purchase of 213 bags on 23rd December, 1950, constituted the source, from which 300 bags were sent to the Bidar railway station on 24th December, 1950, for the order of the plaintiff and they were actually loaded into the wagon on 25th December, 1950. We are therefore satisfied that the learned Subordinate Judge was wrong in holding that, out of the 300 bags sent to the plaintiff, all was new stock except 84 old bags. According to the evidence of P.W. 4, whom we have no reason to disbelieve at least 195 out of the 300 represented old stock. P. W. 4 further states that the maximum time necessary for dryage is one day. He positively denied that the time taken for dryage would be four days. The process of collecting the goods and drying them described by P. W. 4 is this. If dhania purchased was not dry, it will be spread out on the cement platform of this witness for drying. Even before spreading out for drying, the goods would be cleaned by winnowing and mud removed. Even if the sun was not hot and scorching, four or five hours of dryage would be sufficient to make the goods completely dry. As against the evidence of these witnesses, which is corroborated by P. W. 5, there is only the evidence of the Claims Inspector (D. W. 15) on behalf of the Railway. He has said in his report that, though there was no rain in Bidar and neighbouring places, premature crops were sent by P. W. 4 to Mannargudi. The source of his information on this point was the enquiry he made from merchants. In cross-examination, he admitted that this information was not obtained by him from Bidar merchants, but that he obtained it from merchants in Hyderabad market. We may quote his words to show how unreliable this source of information was :—

"I learnt sometimes prematurely cut crops, not properly dried, were booked. No dealer in Bidar told me. But, I learnt in Hyderabad market that sometimes coriander is prematurely plucked and gathered and sent to market. Nobody told me wet crops were sent. As there was no rain in the prior month, there were no wet crops sent to market. But I was told that crops without proper drying were

sent. Undried crops were not sent ; but, semi-dried crops were sent. So I was told in Hyderabad, the headquarters of merchants who do business in Bidar and other places also."

This witness was not deputed to enquire into any other case of coriander seeds despatched from Bidar during December, 1950, getting wet and damaged before reaching destination. In fact, he has said in his report that if similar consignments were found wet at other destinations, it cannot help the railway to repudiate the claim. Of course no such instance was proved. Even otherwise, it is very clear to us that the enquiries made by this witness did not furnish any ground for coming to the conclusion that P. W. 4 sent either wet crops or semi-dried crops. The assertion of this witness to the contrary is purely based upon reports which he heard from Hyderabad merchants and not from merchants in Bidar.

P. W. 5 was examined as an expert witness on the side of the plaintiff. He was Agricultural Demonstrator at Kumbakonam at the time when he was examined in November, 1953. He had served in Bellary in 1939-40 and he claimed knowledge of the dhania crop. He says :—

" Usually, it is not possible to harvest and cut coriander or dhania crops prematurely as coriander will not separate from plant. Even for mature crops, it requires drying up before separation. Immaturely cut crops, however, would not germinate or sprout. Without rain, mere immature coriander crops would not stain or discolour the gunny bags. If coriander crops are not wet, but dried, they would not cake or sprout again without admixture of water."

His qualification was B. Sc. in Agriculture. According to him, though mould is a disease, it would not set in after the crop is cut and harvested. But he admitted that, if there was moisture in the seeds and they were bagged in old gunnies, mould might occur. According to him, there will be sweating if moist coriander seeds were put in gunny bags. The bags would get damp if there was sweating ; and if the railway wagon was air-tight, there would not be any extra moisture at all. He further added that premature harvest of coriander could be done only with difficulty and expenditure and that two or three days' drying would be required for plucking coriander seeds from the plant. Above all, he stated that one day's drying would do after winnowing. He is positive as to the cause of the staining of the gunny bags. According to him, there would not be discolouring of gunny bags, merely because the seeds were moist. He goes further and says that even if unripe coriander is harvested and bagged in gunnies, there would not be outward discolouring or staining of the gunny bags. There might be only slight stains on the inside of the gunny bags. He had worked as an Agricultural Demonstrator for about 15 years at the time when he gave evidence. His knowledge about the coriander crop is not mere book knowledge, as will be seen from the fact that he was working in Bellary during 1939-40, where coriander is grown. The effect of his evidence is that though mould might occur if there was moisture in the seeds which were bagged in old gunnies, this condition could equally appear as a result of rain-water falling on the gunny bags. In fact, he is positive that the staining of the bags on the outside could not be caused by any moisture present in the seeds themselves, and this could only be caused by water coming into contact with the bags on the outside. Having regard to his evidence and the other facts proved in the case, namely, that water was oozing out of the bags and that the floor of the metre-gauge wagon itself was wet, there can be no doubt in this case that 225 bags became damaged only on account of rain-water and not on account of any moisture present in the seeds.

The next question for our consideration is whether this was caused by any negligence on the part of the railway administration. A number of witnesses were examined on behalf of the respondent-railway administration to show that there was no rain all the way from Bidar to Arkonam during the relevant period. D.W. 10, who was a clerk employed in the Control Office in Royapuram station during the relevant period, produced Exhibit B-27, the yard report book maintained by him, in which reports of rainfall occurring between stations, Madras to Raichur and Madras to Bangalore, are noted. Occurrence of heavy rainfall is indicated by the letters ' H.R. ' and slight rainfall by the letters ' S.R. ' Much reliance cannot, however, be placed upon this register for the reason that reports of rainfall are not called for from stations and this register seems to be compiled only from

reports voluntarily sent by the Station Masters. D.W. 10 is unable to say if any record is kept at every station of rainfall. That alone would be a reliable record to prove the assertion that there was no rainfall in any place *en route* from Bidar to Arkonam. There is, however, indication in the evidence of D.W. 9, the transhipment clerk at Arkonam responsible for the transhipment of the consignment now in dispute, that, on the same date on which the suit consignment was handled at Arkonam, another consignment of goods received from Zaheerabad was damaged by water. In that consignment, 201 bags were wet. The telegram which this clerk sent in respect of this consignment is Exhibit B-26 (*a*). There is no evidence to show what happened to this damaged consignment from Zaheerabad. But this circumstance positively proves that more than one consignment which arrived at Arkonam on the date in question in different wagons were damaged by water. The possibility, therefore, of rain having fallen at some place between Bidar and Arkonam cannot be ruled out. That there was heavy rain at Mayavaram and Tiruvalur on the days on which the metre-gauge wagon, in which the suit consignment was loaded, remained in the yard of those stations, is admitted by the witnesses for the railway. Thus, the possibility of rain water entering into both the broad-gauge wagon and the metre-gauge wagon is clearly established by the evidence in the case.

Thus the question for our consideration is whether the evidence let in by the railway administration discharges the burden which lies upon them as bailees to show that they had taken as much care of the goods bailed as a man of ordinary prudence would take under similar circumstances of his own goods. This is the measure of the responsibility of a bailee laid down in section 151 of the Indian Contract Act, which applies to railway administration in this country by virtue of section 72 of the Indian Railways Act. The responsibility of a bailee laid down in section 151 of the Contract Act can be delimited by a special contract. This is provided for in section 152 of the Indian Contract Act. Delay in delivery and the responsibility for the consequent damage to the goods is provided for in section 161 of the Indian Contract Act. But, that question does not arise in this case, since the delay complained of by the plaintiff was only four or five days' delay. According to the plaintiffs, the journey from Arkonam to Mannargudi usually takes four or five days, though in the present case it had taken eight days. In the forwarding note, Exhibit B-1, signed by the broker of the consignor when the goods were delivered at the Bidar station, the following remarks as to the condition of the goods appear. " Bagging second hand ; stitching defective ; new crop ".

The goods were consigned at the owner's risk, and therefore, if the railway is able to establish that the deterioration of the goods was caused by the condition of the consignment as noted in the forwarding note, certainly, the railway would not be liable for the resulting damage. The damage in this case cannot arise either on account of stitching being defective or on account of the crop being new. We have already discussed the question whether the seeds were wet at the time when they were despatched at Bidar. There is no ground to hold that the coriander seeds bagged in gunny bags at Bidar were not of the marketable dry quality. We have also indicated our opinion that the damage could not have been caused by second-hand gunnies being used for bagging the seeds. The only cause for the damage must have been the wetting of the bags by rain water.

Mr. S. S. Ramachandra Ayyar, the learned counsel for the railway administration, cited the decision in *Bengal Nagpur Railway Company* v. *Moolji Sikka & Company*[1] for the contention that, even though the goods were damaged by rain water in the course of the journey, the railway company would not be liable for the damage unless the consignor who claims damages is able to prove that the wagon in which the goods were loaded was leaky even at the station where the journey started. The facts of that case were as follows. The plaintiffs despatched 348 bags of country biris from Tumsar Road railway station to Shalimar station, both situate on the Bengal Nagpur Railway. The goods were loaded at Tumsar Road station on 26th

1. (1930) I.L.R. 58 Cal. 585.

June, 1925 and the wagon reached Shalimar station on the 3rd July following. The goods were delivered on 6th July. The plaintiff had hired a whole wagon for despatching his goods. Sixty bags out of the 348 bags were found to have been damaged by rain. It was established in that case that this damage occurred during the transit from Tumsar Road station to Shalimar station. At the time of taking delivery at Shalimar station, the plaintiff's man found that there were holes in the roof of the wagon, through which water leaked into it and damaged 60 packages. The goods were covered by Risk Notes A and B executed by an agent of the consignor. In construing the word ' misconduct ' used in the Risk Note B, the learned Judge who constituted that Bench held that it included wrongful commission and omission, intentional or unintentional. . . . any act which it wrongfully did and which it wrongfully neglected to do. In effect, they laid down that the word 'misconduct' which they had to construe denoted any unbusinesslike conduct and included negligence or want of proper care which a bailee was bound to take under section 151 of the Indian Contract Act. The change in the law introduced by the amendment of the Railways Act in 1949 does not touch the point relevant for the purpose of the decision of this appeal except that, under the old Risk Note B, the onus was always upon the owner to prove that the injury to the goods was caused by the misconduct of the servants of the railway company, whereas, by the elimination of the risk notes and by reason of the new section 74-A, this onus would be upon the railway except in a case where the goods are carried at owner's risk. Section 74-A enacts thus :—

" (1) When any goods tendered to a railway administration for carriage by railway—

(*a*) are in a defective condition, as a consequence of which they are liable to deterioration, leakage, wastage or damage in transit, or

(*b*) are either defectively packed or packed in a manner not in accordance with the general or special order, if any, issued under sub-section (2) and as a result of such defective or improper packing are liable to leakage, wastage or damage in transit, and the fact of such condition or defective or improper packing has been recorded by the sender or his agent in the forwarding note, the railway administration shall not be responsible for any deterioration, leakage, wastage or damage or for the condition in which such goods are available for delivery at destination, except upon proof of negligence or misconduct on the part of the railway administration or of any of its servants."

Clause (2) of section 74-A is not relevant for our present purpose. Thus, it will be seen that, only under two contingencies, the onus is cast upon the plainiff to prove negligence or misconduct on the part of the railway administration or any of its servants before damages could be claimed when goods are sent at owner's risk. The first relates to the defective condition of the goods, as a consequence of which they are liable to deterioration. The second condition relates to defective packing of the goods which leads to the damage in question. We have already indicated that the damage in this case could not be attributed either to defective condition of the goods or the defective packing of the goods in secondhand gunnies. It follows that in this case the primary onus of a bailee to show that he had taken such care of the goods as a man of ordinary prudence would take in the case of his own goods must be discharged for denying relief to the plaintiff. In our opinion, the decision in *Bengal Nagpur Railway Company* v. *Moolji Sikka & Company*[1] does not touch the question which we have to decide, as it arose under the old B Form Risk Note by which the onus always lay upon the plaintiff to prove misconduct. In this view, it is not necessary for us to say with all respect that the decision in that case went too far when it laid down that, once the wagon was found to be in a good condition at the loading station, the fact that it was found to be in a leaky condition at the destination station could not be attributed to the negligence or misconduct of the railway. The reasoning of the learned Judge was that *en route* the wagon might have developed leaks, for which the railway would not be responsible. It seems somewhat strange that a wagon which was in a leak-proof condition 10 days earlier at the time when the goods were loaded into it should suddenly become leaky 10 days thereafter. However, this decision need not detain us any further, since we hold that, in this case, the onus is primarily upon the railway as a bailee to show that they have taken such care of the goods as a person of ordinary prudence would in the case of his

1. (1930) I.L.R. 58 Cal. 585.

own goods. Of course, there is no evidence to show that the two wagons in question were overdue for repairs or overhaul, because the railway has not produced any registers to show when these wagons were due for overhaul. This is a matter upon which the plaintiff could have taken steps to send for the relevant registers; but his failure to do so could not alter the facts which have been proved in the case. Neither the metre-gauge wagon nor the broad-gauge wagon used in this case could have been leak-proof, as otherwise we are unable to find how the consignment could have been damaged by rain-water. On this point, we must refer to the evidence of D.W. 14, the Train Examiner at Tanjore who is said to have tested the metre-gauge wagon at Mannargudi on 13th January, 1951. That day, he went with six labourers from Tanjore to Mannargudi and tested the metre-gauge wagon in which the suit consignment has been received, by pouring 60 buckets of water over the roof of the wagon. The prescribed procedure for testing a wagon for leaks as laid down in rule 261 of the Standing Orders of the South Indian Railway is that if there is no Train Examiner at the station where the damaged goods were unloaded, the wagon must be consigned to the nearest station with a Loco Department, where the Loco Foreman should be requested to examine it. Of course, the wagon concerned in this case was not sent to Tanjore, but this is not a very material factor. The test carried out by D.W. 14 may not be perfunctory; but it cannot be relied on as a foolproof test to find out if the wagon was leakproof. Thus, though it is not obligatory for a wagon to be tested only at stations with water column, the test adopted by D.W. 14 cannot be accepted by us as an efficient test. For this conclusion, we also rely upon the condition of the wagon, namely, the floor of the wagon being wet at the time when it was opened at Mannargudi station. Leaks may develop in a wagon not only through holes in the roof, but also through the doors nor being waterproof when closed. That P.W. 3 loaded a consignment of paddy into the metre-gauge wagon in question on 13th January, 1951, itself at Mannargudi would not be decisive on this question. Our conclusion is that the damage in this case was caused only because rain-water leaked both into the broad-gauge wagon in which the goods arrived from Bidar upto Arkonam and also in the metre-gauge wagon from Arkonam to Mannargudi.

The next question, is, what will be the amount of damages to which the plaintiff will be entitled? The interest claimed from the date of delivery upto the date of the plaint was given up by endorsement on the plaint. The learned Subordinate Judge indicated in paragraph 14 of his judgment in recording his finding under Issue 4 that, if the plaintiff were entitled to damages, he would award cost-price at Rs. 68 per bag for 125 bags, and at Rs. 77 per bag for 100 bags. He did not accept the plaintiff'a contention that damages should be assessed at the market price ruling on the date of delivery. Mr. R. Gopalaswami Ayyangar, learned counsel for the appellant, did not address any argument to us on the point The rate claimed in the plaint for the damaged bags included the cost of the gunnies, which appears to be *prima facie* untenable, because the price charged by the sender at Bidar included the cost of the gunnies also. The market price ruling between 10th and 20th January, 1951, for the goods at Mannargudi is alleged in the plaint to have been Rs. 75 per bag. The basis of damages claimed is thus set forth in the plaint: the plaintiff is entitled to recover by way of damages the difference between the market value and the money that could be realised by him by sale of the damaged portion of the consignment. Even though the market value of the goods was said to be Rs. 75, the learned Subordinate Judge has found that he would be prepared to award damages for 100 bags at Rs. 77 per bag. We are unable to follow the reasoning by which he arrived at that conclusion. In regard to the remaining 125 bags the learned Subordinate Judge was prepared to allow damages at Rs. 68 per bag. The figure worked out according to the learned Subordinate Judge's rates comes to Rs. 16,200 while, surprisingly, the amount assessed in the plaint as damages is only Rs. 15,537-8-0. Obviously the Subordinate Judge was under a misapprehension as to the amount claimed in the plaint for damages, and his finding as to what the damages would be cannot therefore be accepted by us. The basis adopted in the plaint is the value of the goods at the market rate of Rs. 75 per bag *minus* the actual

amount realised by sale of the damaged bags. To this was added the cost of the gunny bags. Since we have found that the plaintiff could not claim the cost of the gunny bags, the damages to which the plaintiff will be entitled should be calculated on the basis of the claim made in the plaint, which comes to a lesser figure than the figure which the Subordinate Judge was prepared to award.

In the result, the appeal is allowed. The decree of the learned Subordinate Judge is set aside, and the appellant-plaintiff is given a decree for Rs. 14,459-1-6 with interest on this amount at 6 per cent. per annum from the date of the decree of the Subordinate Judge till the date of payment with proportionate costs in both the Courts.

R.M.. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

Indian Airlines Corporation .. *Petitioner**

v.

Jothaji Maniram .. *Respondent.*

Carriers Act (III of 1865)—Applicability to carriage by air—Liability of carrier by air for loss—Carriage by Air Act (XX of 1934)—Scope of—Carriage of goods within India—Liability of carrier for loss—Extent of—If common carrier—Contract Act (IX of 1872), sections 151 and 152—Applicability—Special contract limiting liability to specified amount and exempting from liability in respect of specified cases—Validity—Consignor signing declaration and agreeing to conditions and limitations in consignment note—Rights of—Presidency Small Cause Courts Act (XV of 1882), section 38—Powers of Full Bench—Finding of fact—Interference.

Under the general law, a common carrier is liable practically as an insurer of goods, but that liability can be regulated by a contract entered into between the carrier and the consignor of goods. Where a consignor or his agent has signed a declaration and expressly agreed to all the conditions and stipulations contained in the consignment note, defining and limiting the carrier's liability, the burden would be upon the consignor or his agent to show that his signature was secured by fraud or misrepresentation or that he had no notice of the conditions. A party who expressly contracts, stating that he is aware of the terms and conditions, should not be allowed to say that he was not aware of the terms and conditions unless he proves that he was not so aware.

The Carriers Act, 1865, does not apply to the case of carriage of goods by air. The definition of a common carrier in section 2 of that Act does not include a carrier by air.

The liability of a carrier of goods by air has not been completely put on a statutory basis in India. The Carriage by Air Act, 1934, relates only to international carriage and cannot apply to the carriage of passengers or goods by air within India. Since there has been no notification of the kind contemplated by section 4 of the Act, there are in India no statutory rights, duties and liabilities of carriers and their passengers and of consignors, carriers and consignees of goods in respect of non-international carriage by air. The liability of a carrier by air is therefore only that of a bailee and sections 151 and 152 of the Contract Act would apply.

Even assuming that a carrier by air is a common carrier if he gives notice that he will contract liability only to a limited extent, and in respect of articles of a given value, he ceases to be an insurer beyond that ; it would be open to a common carrier to contract himself out of liability as a common carrier or fix the limit of his liability.

Where there has been a loss on account of the negligence of the carrier in respect of which a contract has been entered into, limiting the liability of the carrier to a specified amount, and there is a finding that the loss is attributable to negligence and not to the breach of any of the conditions of the contract of carriage, exempting the carrier from liability the contract being valid and enforceable the carrier can be made liable only for amount specified and no more.

B. A. S. Company v. *Chockalal Ram*, (1952) 2 M.L.J. 270, followed, *Sheik Mohamed* v. *B. I. S. N. Co., Ltd.*, (1908) 18 M.L.J. 497: I.L.R. 32 Mad. 95 (F.B.), relied on. Case-law referred to and discussed.

Under section 38 of the Presidency Small Cause Courts Act, the Full Bench is not competent to upset the finding of fact arrived at by the trial Judge and to give its own finding on a question of fact.

Petition under section 115 of Act V of 1908, praying the High Court to revise the Order of Small Causes Court of Madras, dated 12th April, 1957 and made in N.T.A. No. 264 of 1956 against S.C. No. 5772 of 1955.

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* C.R.P. No. 974 of 1957.

28th August, 1958.
(6th Badhra, 1880—Saka).

S. Govind Swaminadhan, for Petitioner.

P. P. Selvarajan and *J. W. D. Jesudasan*, for Respondent.

The Court delivered the following

JUDGMENT.—The respondent, a merchant at Madras, sent on 9th March, 1955, a parcel of pen nibs valued at Rs. 1,600 to Calcutta, through the Indian Airlines Corporation, the petitioner. Before accepting the goods for carriage, the petitioner issued a consignment note, Exhibit P-1. It sets out the terms and conditions of the carriage. In the front portion of Exhibit P-1, the agent of the respondent, who despatched the goods, signed a statement stating that he was aware of and was accepting the general conditions of carriage and special conditions, more particularly referred to or set out on the reverse of that document. One of the special conditions, which is legibly printed on the reverse of the consignment note was that the carrier, namely, the petitioner,

> " shall be under no liability whatsoever to the consignor or to the consignee, etc., for loss, damage, detention or delay to the goods arising out of the carriage . . . . whether or not caused or occasioned by the act, neglect, negligence or default of the carrier or of pilots, flying, operational or other staff or employees or agents or the carrier or otherwise however. . . The said exemption from liability and indemnities in favour of the carrier extend to the carriage of surface transport of the goods to or from the airport at a place of embarkation, destination, etc. . . . the custody, loading or unloading of the goods into and from aircraft or surface transport and to all other services and operations of the carrier whatsoever. It was, however, stipulated that in so far as any liability may be imposed on the carrier by law, such liability for loss or damage to the goods, etc., would be limited and agreed to be in the aggregate the actual value thereof or the declared value thereof or Rs. 300 whichever is the lowest, notwithstanding that any loss, damage or delay may have been caused or occasioned by the act, neglect, negligence or default on the part of the Carrier ".

It appears from the evidence that the goods were actually despatched from Madras to Calcutta by the night air mail service on 9th March, 1958. But the goods were not delivered to the consignee. The enquiry made into the matter by the petitioner, the Indian Airlines Corporation, did not enable them to trace the missing parcel. The respondent, thereupon, filed the suit out of which the present revision petition arises in the Court of Small Causes, Madras, to recover a sum of Rs. 1,858 together with costs, the said sum representing the value of the goods despatched and damages for the loss. The petitioner contested the claim. The written plea filed on its behalf merely stated that the plaintiff had no liability under the terms and conditions of the contract. Evidence was let in on behalf of the parties, and the learned Chief Judge of the Court of Small Causes, who tried the case, held that the parties were bound by the terms and conditions of the consignment note, and that the respondent was entitled to a decree only for Rs. 300 in accordance with the conditions of the contract contained therein. Aggrieved by this, the respondent filed an application for a new trial before the Full Bench of the Court of Small Causes. The Judges, constituting a Full Bench, held that the terms and conditions printed on the reverse of Exhibit P-1 was not brought to the knowledge of the respondent so as to make them binding on him and, after going elaborately into the liability of a common carrier under the English Law, for negligence, held that the petitioner would be liable under section 8 of the Carriers Act. On the further finding that there was negligence on the part of the Airlines Corporation, they held that the respondent was entitled to a decree as prayed for and passed one accordingly. The petitioner has filed this revision petition against the decree so passed.

Two questions were argued before me in the revision petition by the learned advocates appearing on either side. The first was whether the terms and conditions limiting liability of the carrier were brought to the knowledge of the consignor, so that he can be held to be bound by them. The second was whether the carrier was liable to pay the entire damage claimed, notwithstanding the limitation of the liability contained in the consignment note. On the first question, the learned Judges who heard the New Trial Application held that what the Petitioner did was not rea-

sonably sufficient to make the contents of Exhibit P-1 known to the consignor. *Prima facie* the question involves a finding of fact, which the Judges constituting the Full Bench, on the terms of section 38 of the Madras Presidency Small Cause Courts Act, are not competent to give. But even apart from that question, I am of opinion that the conclusion arrived at by the learned Judges is incorrect. It is well-known that under general law a common carrier is liable practically as an insurer of the goods. That liability can be regulated by a contract entered into between the parties. It is comparatively rare to find any common carrier to convey goods under such liability, as it is invariably the practice for common carriers to enter into a contract, defining and limiting their liability. That practice is so universal that in the normal course of things one would expect any consignor of goods to look into such conditions which are found in consignment notes. To say that in every case the carrier should prove that he drew the attention of the consignor to the clause in the consignment note regarding limitation of its liability is extending the rule beyond its limits. It is, however, unnecessary to pursue this point, as I am of opinion that under the law where a consignor or his agent has signed a declaration and expressly agreed to all the conditions in the consignment note, the burden would be upon him to show that his signature was secured by fraud or misrepresentation or that he had no notice of the conditions. As stated already, the consignment note, which contained on its reverse the terms and conditions of the carriage of goods, was signed by the agent of the respondent stating that he expressly agreed to the special conditions contained in that document. In *Ludditt* v. *Gingercoote Airways*[1], a similar question arose. In that case an action was laid for damages for injuries caused to the passengers by the negligence of the carrier's servants in an aircraft. In the tickets issued to the passengers conditions limiting the liability of the carrier were printed. The question arose whether the passenger would be bound by the limitation of liability of the carrier contained in the tickets. The Privy Council proceeded on the footing that as the passengers had signed the tickets it was for them to show that they had not sufficient notice of the conditions.

A contract of carriage is generally accompanied by a ticket or consignment note embodying the terms and conditions on which the carrier is willing to convey the passengers or the goods. A passenger, accepting the document, very often does not care to read the conditions printed on the ticket or consignment note which are often found in small print. In such a case where a party denies that he was aware of the conditions of the contract of carriage, it would be for the carrier to establish that the party knew that the document contained the conditions or that he did his duty of calling his attention to it. But in a case where the signature of a party is taken to the contract itself, the matter should stand on a different footing. The party who expressly contracts, stating that he is aware of the terms and conditions, should not be allowed to say that he was not aware of the terms and conditions unless he proved that he was not so aware. This distinction between a case where a party was simply given a consignment note wherein the conditions of the carriage were endorsed and a case where he signed the consignment note agreeing to the conditions, has been referred to in Shawcross and Beaumont, on Air Law (second edition). In Article 350 the learned authors say this :—

> " But when the document relied on by the carrier has been signed by the other party (as in the recent case of *Luddit* v. *Gingercoote Airways*[1] in which all liability was excluded), he is (in the absence of fraud or misrepresentation) bound by its terms and conditions, whether he knew, or had notice of them, or not "

In the present case there is no evidence on behalf of the respondent to show that there was any fraud or misrepresentation in securing the signature of his agent to the consignment note. There is no reason to presume that the respondent's agent did not know the terms and conditions printed on the reverse of the consignment note, or that he signed the declaration in utter ignorance of the conditions. In my opinion, the petitioner has done all that is reasonable and necessary in the cir-

1. L.R. (1947) A.C. 233.

cumstances to put the respondent on notice of the terms and conditions on which he was willing to carry the goods. It follows that the conditions found on the reverse of Exhibit P-1 would govern the rights of the parties.

The learned Judges of the Full Bench of the Court of Small Causes relied upon section 8 of the Carriers Act (III of 1865) for the purpose of holding the petitioner liable for the loss or damage caused by its neglect. The Carriers Act cannot apply to the case of carriage of goods by air, for the term 'common carrier' is defined under section 2 of that Act as

"a person other than the Government engaged in tbe business of transporting for hire property from place to place, by land or inland navigation, for all persons indiscriminately."

This does not include a carrier by air and its liability cannot be found on the basis of that section. But before me the learned counsel for the respondent put his case in a wider basis. He contended that the petitioner was a common carrier, and as a common carrier was liable for the loss of the goods occasioned by its negligence. The liability of a carrier of goods by air has not been completely put on a statutory basis. The Convention of Warsaw which was signed on 12th October, 1929, is expressed to be a convention for the unification of certain rules relating to international carriage by air. That established uniform rules governing the rights, duties and liabilities of carriers and their passengers and of consignors, carriers and consignees of goods by air, in the case of carriage to which the convention applied. India was one of the contracting parties to that convention, and in pursuance of the convention, the Carriage by Air Act (XX of 1934) was passed by the Indian Legislature. That relates only to the international carriage and cannot apply to the case of carriage of passengers or goods by air within India. Section 4 of the Act states :—

"The Central Government may, by notification in the Official Gazette apply the Rules contained in the first schedule and any provisions of section 2 to such carriages by air, not being international carriage by air as defined in the first schedule, as may be specified in the notification, subject, however to such exceptions, adaptations and modifications, if any, as may be so specified."

There has been no notification of the kind contemplated under section 4, with the result that in India there are no statutory rights, duties and liabilities of carriers and their passengers and of consignors, carriers and consignees of goods in respect of non-international carriage by air. In England such notification appears to have been made in the year 1952 styled as the Carriage of Non-international Carriage, United Kingdom Order, 1952. There being thus no statute governing the rights, duties and liabilities of carriers and their passengers and of consignors, carriers and consignees of goods by air, applicable to the present case, the matter has to be decided on the principles of ordinary law, that is, those contained in the Indian Contract Act and the principles of English Law which have been held to be applicaple to common carriers in India.

Before proceeding to consider the liability of the carrier under the Indian Contract Act, it is necessary to ascertain whether the petitioner is a common carrier. In Exhibit P-1 it is expressly stated when setting out the conditions of the carriage as follows :—

"The carrier declares that it is not a common carrier and does not accept the obligation or liability of a common carrier".

Then the question would arise as to what type of the carrier the petitioner is. A common carrier is a person who professes himself ready to carry goods for everybody. Any carrier which is not a common carrier is called a private carrier. Such a private carrier would, where goods are entrusted to him for carriage, be liable as bailee of the goods, and this liability, as would be stated hereafter, could be limited or excluded by the contract between the parties. In the case of a common carrier the liability under similar circumstances would be higher. Common carriers are considered to be in the position of insurers with regard to the goods entrusted to them. In *Aslan* v. *Imperial Airways Limited*[1], a box containing bullion was handed over to the Airways Company for carriage. The carrier, however, failed to deliver the box at the destination, as it had disappeared and could not be traced. In an

1. (1933) 38 Com. C. 227 at 233.

action by the consignor against the carriers it was held that the carriers were not common carriers, but were only bailees for reward and as such would have been liable only for negligence ; and that even if it were that the defendants had been negligent in relation to the custody of the box, they had protected themselves from liability by the terms of the contract. The question whether the carrier was a common carrier or undertook the responsibility of a common carrier, was considered by Mackinnon, J. The learned Judge observed at page 235 :—

> "I see no reason why a man who carries goods by a machine that travels through the air should not be a common carrier or assume the liabilities of a common carrier if he acts in a certain way.... and if a man who owned an aeroplane or a seaplane chose to engage in the trade of carrying goods as a regular business and to hold himself out as ready to carry for any who wished to employ him so far as he had room in his airship or aeroplane for their goods, very likely he would become a common carrier or be under the various liabilities of a common carrier."

But the learned Judge held that the question whether the carrier was common or private carrier had to be considered on the terms of the contract between the parties. The learned Judge then referred to the conditions printed in the back of the consignment note which was in evidence in that case and came to the conclusion that the carrier was not a common carrier. In the instant case, even apart from the construction of any condition in the contract which would militate against the petitioner being a common carrier, it is expressly stipulated between the parties that the petitioner is not a common carrier. In my opinion, that would conclusively show that the petitioner cannot be made liable as a common carrier. If the petitioner is not a common carrier but only a private carrier, there is no doubt that its liability being that of a bailee, sections 151 and 152 of the Indian Contract Act would apply.

Even assuming that the petitioner could be deemed to be a common carrier or held liable as such, I am of opinion that in the present case the petitioner has validly contracted by limiting the liability to Rs. 300. Under the English Law there were two classes of bailees upon whom the law imposed a greater degree of liability than that of an ordinary bailee. They were (1) common carriers and (2) innkeepers. These persons were held liable for safety of the goods entrusted to them in all events except the loss or injury occasioned by act of God or King's enemies or from the fault of the consignor or inherent defect in the goods. Such a liability of the carrier may however be varied or abrogated by a contract between the parties. In *Ludditt* v. *Ginger Coote Airways*[1], the question arose with reference to the carriage of passengers. The tickets given to the passengers exonerated the liability of the carrier for loss, damage or injury by the aeroplane operator, including those caused by negligence, default or misconduct of the carrier. Injuries were sustained by some of the passengers, and the question arose as to whether the carrier was liable. The Privy Council held that the contract embodied in the ticket containing the conditions was valid and enforceable and the claim of the injured passengers failed. In the course of their judgment, their Lordships referred to the observations of Maule, J., quoted by Atkin, J., in *G. N. Ry Co.* v. *L E. P. Transport and Depository Limited*[2], which were as follows :—

> " I deny the truth of the position that a man who is not an insurer is therefore not a common carrier. A common carrier who gives no notice limiting his responsibility is an insurer ; but if he gives notice that he will contract only to a limited extent, and with respect of articles of a given value, he ceases to be an insurer beyond that, though, in all other respects, he remains a common carrier."

The result is that it would be open to a common carrier to contract himself out of liability as common carrier, or fix the limit of his liability as he has done in the present case. The learned advocate for the respondent referred me to a decision in *Woolmer* v. *Delmer Price Limited*[3]. In that case the plaintiff left her fur-coat with the defendants for them to store it during summer months. A receipt which was granted to the plaintiff stated " all goods left at customer's risk". The defendant failed to return it on demand, and an action was brought for return of the coat or its value, or alternatively damages for breach of contract. It was held that unless the defendants established that the loss occurred in some way not involving negli-

1. L.R. (1947) A.C. 233.
2. L.R. (1922) 2 K.B. 742, 771.
3. (1955) 1 All E.L.R. 377.

gence or loss, they were liable and they could not be protected by the " customer's risk " clause. In that case as the defendants had not shown as to how the loss occurred, it was held that there was a possibility of loss having occurred on breach of conditions of the contract and that, therefore, the "customer's risk" clause would not apply. In my opinion, the principle of that decision has no bearing on the facts of the present case. Here there is a loss on account of the negligence of the carrier in respect of which a contract has been entered into limiting the liability of the carrier to a sum of Rs. 300, and it has been found that the loss is attributable to negligence. There is no case that the loss could be attributed to the breach of any of the conditions of the contract of carriage. The question then arises whether the respondent could be entitled to a decree on the basis of section 151 of the Indian Contract Act. Section 151 imposes on the bailee a duty to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods. The section does not say that it is subject to a contract between parties. *Prima facie* it appears to lay down irreducible minimum care required of a bailee. Sankaran Nair, J., in *Sheik Mahomed* v. *B.I.S.N. Co.*[1], observed that a contract by a bailee to exempt himself from liability for the negligence of himself was not valid. That was, however, only a dissenting judgment. The other two Judges, who constituted the Special Bench, were of opinion that there was no difference between English law and Indian Law on the question, and it was open to the parties to enter into a contract reducing the liability under section 151 of the Indian Contract Act. It is unnecessary to consider the decisions of other High Courts in regard to that matter, as the question has been fully considered in the Judgment of a Bench of this Court in *B. A. S. Company* v. *Chokalal Ram*[2], where the learned Judges held that the liability of a common carrier for loss may be varied by contract. If the liability under section 151 of the Indian Contract Act could be modified or abrogated by a contract between parties, the contract in the present case would be a valid one whether the petitioner is regarded as a common carrier or a private carrier. I am of opinion that the contract limiting the liability of the carrier as contained in Exhibit P-1 is valid and enforceable. The result is that the judgment and decree of the Full Bench of the Court of Small Causes should be set aside and those of the Chief Judge be restored. I order accordingly. This Civil Revision Petition is allowed. There will be no order as to costs in any of the Courts.

P.R.N. ——— *Petition allowed :*
Full Bench Decree set aside :
Trial Judge's restored.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE BALAKRISHNA AYYAR.

Messrs. Jayaram Mills Ltd., Rajapalayam .. *Applicant**

v.

The Commissioner of Excess Profits Tax, Madras .. *Respondent.*

Excess Profits Tax Act (XV of 1940), section 6 and rule 1 of Schedule II—' Capital employed '—Meaning of—Ascertainment of standard of profits—Whether the assets acquired should have actually been used.

A reading of section 6 (1), Proviso and sub-rule (1) of Schedule II of the Excess Profits Tax Act makes it clear that if the funds of an assessee has been used to acquire assets for being used in the business of the assessee, it would be capital employed in the business within the meaning of the rule. Actual employment or use of the assets acquired, such as machinery, spare parts, etc., in the business is not necessary. So long as the asset remains part of the capital employed in the trade or business of the assessee it will be capital employed within the rule even though it is not actively or productively employed in the accounting period.

Inland Revenue Commissioners v. *Byron Ltd.*, (1945) 14 I.T.R. (Supp.) 1 and *Birmingham Small Arms Co.* v. *I.R.C.*, (1951) 2 All E.R. 296, referred.

1. (1908) 18 M.L.J. 497 : I.L.R. 32 Mad. 95 (F.B.).
2. (1952) 2 M.L.J. 270.

* Case Referred No. 33 of 1953.

16th October, 1958.
(24th Asvina 1880, Saka).

Case referred to the High Court by the Income-tax Appellate Tribunal, Madras 'B' Bench, under section 66 (2) of the Indian Income-tax Act (XI of 1922) in R.A. No. 144 of 1950-51 (E.P. T. A. No. 275 of 1948-49) on its file for decision on the following questions of law, *viz.*

"Whether on the facts and circumstances of the case, in computing the average amount of capital employed in the assessee's business in the chargeable accounting period ending 31st March, 1946, the exclusion of the value of the building, plant, machinery, and electric fittings of the weaving department, was in accordance with Schedule II, Rule I ?"

S. Swaminathan, for the Applicant.

C. S. Rama Rao Sahib, Special Counsel for the Income-tax, for Respondent.

The Judgment of the Court was delivered by

Balakrishna Ayyar, J.—The assessee is a limited liability company which commenced business on 29th April, 1943, as a spinning mill. Some time later the assessee decided to expand its activities and open a weaving department, and, for this purpose purchased in 1944 eighty-one looms and various items of machinery from the Coimbatore Spinning and Weaving Mills. On 29th July, 1945, the assessee commenced the construction of buildings to house its weaving department, and, by June, 1946, the work was completed and the machinery installed. But, the weaving section actually commenced to operate only in July, 1947.

The assessee company was subject to excess profits tax. In computing the average capital of the assessee for the chargeable accounting period between 1st July, 1945 and 31st March, 1946, the Excess Profits Tax Officer excluded the value of the buildings, plant and machinery which related to the weaving department.

On an appeal by the assessee the Appellate Assistant Commissioner held that the amount expended on the buildings, plant and machinery connected with the weaving department was capital employed in the business of the assessee and should therefore be taken into account in computing the average capital.

The department appealed against this decision. The Appellate Tribunal held that since

"the weaving department of the assessee did not go into production during the chargeable accounting period the assets of the aforesaid department did not yet become business assets and hence did not become capital employed for the purpose of earning profits during the chargeable accounting period and the value of such assets cannot therefore be taken in the computation of average capital".

In other words, it reversed the decision of the Assistant Commissioner.

In pursuance of the orders made by this Court in C. M. P. No. 10254 of 1951 the Appellate Tribunal referred the following question for the decision of this Court:

"Whether on the facts and circumstances of the case in computing the average amount of capital employed in the assessee's business in the chargeable accounting period ending 31st March, 1946, the excluding of the value of the building, plant, machinery and electric fittings of the weaving department was in accordance with Schedule II, Rule 1."

On 20th August, 1956, an order was made directing the Tribunal to :

"submit a specific finding on the question, whether the spinning and weaving departments constituted one business of the assessee or whether they constituted two separate and distinct business of the assessee during the relevant period."

That finding has now been received and it is to the effect that :

"both the spinning and weaving sections of the assessee can only form part and parcel of a single manufacturing business carried on by the assessee during the chargeable accounting period in question."

The question, therefore, is whether the capital laid out by the assessee on its weaving department can be taken into account for ascertaining the average amount of capital employed in the business of the assessee within the chargeable accounting period.

We shall first quote the relevant statutory provision. We begin with section 6 of the Excess Profits Tax Act and the first proviso thereto, which run as follows :

"*Section 6—Standard profits.*—(1) For the purpose of this Act, the standard profits of a business in relation to any chargeable accounting period shall, subject to the provisions of sub-sections (3) and (4), be an amount bearing to the profits of the business during the standard period, if in respect of that business a standard period is available, the same proportion as the chargeable accounting period bears to the standard period :

Provided that if the average amount of capital employed in the business during such chargeable accounting period is greater or less than the average amount of capital employed during the standard period, such amount shall be increased or decreased, as the case may be, by an amount calculated by applying the statutory percentage to the amount of such increase or decrease."

Then we have sub-rule (1) of rule 1 of Schedule II which is as under :

"1. (1) Subject to the provisions of this Schedule, the averable amount of the capital employed in a business (so far as it does not consist of money) shall be taken to be—(*a*) so far as it consists of assets acquired by purchase on or after the commencement of the business, the price at which those assets were acquired, subject to the deductions hereafter specified ;

(*b*) so far as it consists of assets being debts due to the person carrying on the business, the nominal amount of those debts, subject to the said deductions ;

(*c*) so far as it consists of any other assets which have been acquired otherwise than by purchase as aforesaid, the value of the assets when they became assets of the business, subject to the said deductions."

It will be noticed that the rule states that the average amount of capital employed in the business shall be the price paid for assets where such assets have been purchased, the nominal amount of debts where the assets consist of debts, and, the value of the assets where they have been acquired otherwise than by purchase. It will be also noticed that the word " employer " used in the sub-rule relates to capital and not be assets. Purely as a matter of grammatical construction it is not necessary to satisfy the requirements of this sub-rule that the assets should be employed in the business. What the rule says is that the capital employed in the business shall be taken to be the price or value of the assets or the amount of the debts. It does not say that the assets should be employed in the business. Apart from authority, therefore, on the mere language of the rule, one would be justified in saying that if the funds of the assessee have been used to acquire assets for being used in the business of the assessee, that would be capital employed in the business within the meaning of the rule. Actual employment of the assets acquired is not necessary. The assessee may lay by a large stock of spare parts. It may happen that no occasion arises to utilise such spare parts. Still the money spent in acquiring the spare parts would be capital employed in the business of the assessee. Similarly the assessee may acquire an engine to replace another which it is feared may break down. The new engine may not be used at all. Nevertheless it would be an asset of the assessee and the money used to purchase that piece of machinery would be capital of the assessee employed in its business. The circumstance, therefore, that in the present case the weaving department did not go into actual production will not disentitle the assessee from claiming that the money spent on it should be considered to be capital employed in its business.

Learned counsel for the assessee referred to *Inland Revenue Commissioners* v. *Byron Ltd.*[1] The relevant facts and the contentions of the Crown are correctly summarised in the first part of the head-note :

"The respondent company carried on business as theatre proprietors, and in April, 1937, bought the 'A'. Theatre at Hull for £12,280. On May 7, 1941, the theatre was destroyed by enemy action. The free-hold site continued to belong to the company. The Crown contended that there had been a decrease in the average amount of the capital employed in the respondents' business in the accounting period ending May 26, 1941, and that the standard profits should therefore be decreased in relation to that accounting period by the statutory percentage

1. (1945) 14 I.T.R. (Sup.) 1.

of 6 per cent. on the decrease of capital, and that the company was left with a new and different asset from the asset it acquired for £ 12,280 in April, 1937 ".

The Court held that

" So long as the asset remains part of the capital employed in the trade or business, it would appear, therefore, that the value to be put upon it for the purposes of calculating excess profits tax is not to be increased with the increase of its real value, and, equally, that changes of circumstances which in fact render the asset no longer worth its original value do not affect the value to be put on the assets for excess profits tax purposes. In these respects, as well as in others, the valuation of capital under the Schedule for the purpose of calculating the tax is manifestly different from the valuation which would be proper in a balance-sheet or in the application of company law."

Again,

" All that has happened is that, while the original asset continues to be owned by the company, its value has been greatly reduced by the damage which has occurred.On this view of the facts the value that must be attributed to the asset for the purposes of the tax is the price originally paid for it, and there is no decrease in the capital when the capital is computed in accordance with the Seventh Schedule. *The Crown put forward, as an alternative contention, the view that the damage which has occurred produced the result that whatever capital the company previously had at Hull was no longer ' employed in its trade or business.'* In my opinion, this contention is not sound. The fact that the Hull building has been so much damaged that it cannot at present be used as a theatre does not seem to me in itself to establish that the freehold site and what is upon it is not still ' employed in the trade or business.' If the company decided to abandon the use of the site for the purpose of its business, different considerations might arise. If, however, the theatre was for other reasons temporarily closed, or if it was in course of reconstruction and improvement, this would not justify the contention that it formed no part of the capital referred to in Part II of the Seventh Schedule. Even if it be the case that, for the purposes of excess profit tax, the capital employed in a trade or business of a company does not necessarily include all the capital of the company (and it certainly expressly excludes investments held by a company the income from which is not to be taken into account in computing the profits of the trade or business (Seventh Schedule, Part II, para. 3), the asset at Hull must be regarded as still employed in the trade or business, even though it is not actively or productively employed in the accounting period."

This decision is certainly authority for the view that the contention that the assets must have been actually employed or put in use before the value of such assets can be said to be capital employed in the business of the assessee, is not sound.

Mr. Rama Rao Sahib, the learned advocate for the Department, however, referred to *Birmingham Small Arms Co.* v. *I. R. C.*[1] The material facts are summarised in the first paragraph of the head note:

" On several occasions the factory of a company was severely damaged by enemy action, and it was agreed with the Board of Trade for the purose of the War Damages Act, 1941, section 62 (1), that November 22, 1940, should be taken as the date from which interest should accrue in respect of any claim under the Act for compensation for the destruction of machine tools and plant. On November 12, 1945 the amount of the claim was finally agreed by the Board of Trade at £6,47,012. Payment was made in one sum in March, 1947. In the assessment of the company to excess profits tax for the chargeable accounting period beginning August 1, 1940, and ending July 31, 1941, in computing the amount of capital employed in their trade or business, no account was taken of the right of claim to compensation."

The Court ruled that the claim to compensation was not an asset, the value of which, during the chargeable accounting period in question, formed part of the capital employed in the business of the assessee.

It will be at once perceived that there is one important difference between that case and the instant case. In the English case all that the company had was a claim to compensation which might or might not materialise. In the case before us that is not so. The capital of the company had actually been expanded in the acquisition of an asset in order that it might be put in use. All that happened is that the assessee was not actually able to do so.

Mr. Rama Rao Sahib referred to certain passages from the speech of Lord Simonds at page 299 :

" My Lords, it is plain on the face of this sub-para. (1) that ' *capital employed' means assets employed.* For the capital is something which ' consists ' of money or ' consists ' of assets of varous kinds. Then by a slight twist the ' value ' of the assets becomes the ' amount ' of the capital".

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1. (1951) 2 All E.R. 296.

Again,

" My Lords, I see no valid reason for disregarding and giving no meaning to the word ' employed '."

When, however, we read the speeches of the other learned Lords we find that this view that the assets should have been employed expressed by Lord Simonds was not accepted by them. Lord Radcliffe said :

" *The test in computing capital is not whether an asset belonging to the proprietor of a business is employed* in his business or not, but *whether there is capital employed in his business consisting of this or that asset.* In many cases, there is no difference at all between the two questions : in a few cases the difference may be important. But to treat them as the same question does tend to lead to a confusion that has not been absent from the arguments in this case, for, whereas *once capital has been introduced into a business it may naturally be regarded as still employed in it until such capital is lost or withdrawn.* I have not been able to bring to my mind any clear conception of what is meant by an asset being employed in a business if it means something different from merely belonging to it. Your Lordships have been, in effect, invited to say that there is some pregnant meaning that should be attached to the word " employed " in this connection. I do not think that I am being unfair to the argument of the respondents if I say that we were not presented with any set of words which were capable of defining what that pregnant meaning might be, apart from the suggested interpretation of the word " employed " as meaning " actively or productively employed during the accounting period " which has already been rejected by this House in the *Terence Byron Case*[1].

. . . .

My Lords, I do not think that the words ' capital employed in a trade or business ' bear any significant difference of meaning from the words ' capital of a trade or business '.

. . . .

Throughout this section the word ' *employed* ' is used in *reference to capital*, but I take it to be clear that it is not introduced with the purpose of drawing any distinction between the various kinds or measures of use to which assets may be put once capital of the business has come to consist of them. They themselves may be money, or debts, or real or personal property, but, if they represent a form in which capital of the business has clothed itself for the time being, no further question needs to be asked as to the nature of their contribution at any particular period to the conduct of the business.

. . . .

But I think that it would take a good deal of argument to demonstracte that ' capital employed in a trade or business " in Schedule VII to this Act has some meaning asscertainably distinct from " capital of a trade or business ", if the two phrases were, as I think, interchangeable under the former Act.

. . . .

Secondly, capital employed may consist of assets that are ' inherently unproductive '.

. . . .

I should have concluded from these indications and the legislative history of the words ' capital employed ' that they were used in the present Act without any reference to the actual use made of particular assets during a particular period, once it could be said of them that they were a form of capital which had been put into the business."

Lord Tucker was of the same view :

" My Lords, I agree with those of your Lordships who consider that authority, as well as the legislative history of the words ' capital employed ', point to the conclusion that in their present context *they do not* refer to the actual use made of a particular asset in the relevant accounting period once it is shown to have been a form of capital put into the business and still there."

To us it does not appear that the decision relied on by Mr. Rama Rao Sahib is authority for the position that the assets must have been put into use. It seems to us to be sufficient if the assets have been acquired for the purpose of the business, and, whether used or not, are still there and available for the use of the business.

In the result, we answer the question referred to us in the negative and in favour of the assessee. The assessee will get its costs.

Counsel's fee Rs. 250.

R.M. ——— *Reference answered accordingly.*

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1. (1945) 1 All E.R. 636.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

State of Madras by Collector of Ramanathapuram .. *Appellant**

v.

Rameswaram Devasthanam by trustee V. B. Kuppuswami Mudaliar and others .. *Respondents.*

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948) *and Madras Estates Land (Reduction of Rent) Act (XXX of* 1947)—*Applicability—Grant of some shares of village to Devasthanam and some share to Dharmasanamdars—Separate title deeds and separate enjoyment of each portion by respective grantees—Each forming distinct and separate block—Effect—Madras Estates Land Act (I of* 1908), *section* 3 (2) (*d*)—" *Any inam village* "—*Meaning of*—" *Estate* "—*Burden of proof.*

The burden of proof that a certain land constituted an " estate " within the meaning of the Estates Land Act is clearly upon the party who sets up the contention. In order to come within the definition of an " Estate ", the grant must fulfil two conditions : (*a*) the words of the grant should expressly, and not by implication, make it a grant of a particular village as such by name and not a grant of a defined specific area only ; and (*b*) the area, if any, excluded should already have been granted for service or otherwise or should have been reserved for communal purposes.

Where in a village two blocks of land are held under two separate grants by two different persons and they are recognised under two separate title deeds by the British Government, neither block can be held to be an " estate " within the meaning of the Estates Land Act. " Any inam village" in section 3 (2) (*d*) of the Act means whole village granted in inam and not anything less than a village, however big a part it may be of the village.

Where the entries in the Inam Register show that there were two different and distinct grants, one of 80 shares or vrithis out of a named village and the other of 4 shares or vrithis, the former being in favour of the Rameswaram Devasthanam, and the latter being in favour of the Dharmasanamdars of the Devasthanam, and there is nothing to show that there was a single grant of the whole village either to the Devasthanam or to the Dharmasanamdars, each portion being distinct and separate from the other, and enjoyed separately, it cannot be held that the original grant consisted of the entire village as such to the Devasthanam and that the Dharmasanam portion came out of it by a subsequent grant. Neither portion can be held to be an " estate ". Consequently the provisions of the Madras Estates Land (Reduction of Rent) Act, 1947, and the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, cannot apply to the village.

District Board of Tanjore v. *Noor Mohamed,* (1952) 2 M.L.J. 586 (S.C.): A.I.R. 1953 S.C. 446 and *Andiappa Pillai* v. *State of Madras,* (1953) 1 M.L.J. 112, relied on.

Appeals against the Decree of the District Court, Ramanathapuram at Madurai, in A. S. No. 32 of 1954, preferred against the Decree of the Court of the Subordinate Judge of Ramanathapuram at Madurai, in O.S. No. 9 of 1953.

The Government Pleader (*B. V. Viswanatha Ayyar*) for Appellant in S. A. No. 59 of 1955 and second Respondent in S. A. No. 134 of 1955.

A. Sundaram Ayyar, C. S. Rama Rao Sahib, R. Sundaralingam, V. Seshadri and *K. S. Ramamurthi,* for Respondents in both.

The Court delivered the following

JUDGMENT.—These are two connected appeals preferred against the decree and judgment of the learned District Judge of Ramanathapuram in A. S. No. 32 of 1954, reversing the decree and judgment of the learned Subordinate Judge of Ramanathapuram, in O.S. No. 9 of 1953.

The case of the plaintiff Rameswaram Devasthanam was 80 out of 84 shares in Venkatankurichi village in Paramakudi Taluk were given in Inam to the plaintiff Devasthanam by the ancestors of the Raja of Ramanathapuram and the remaining

* S. As. Nos. 59 and 134 of 1955. 8th October, 1958.

four shares were granted in Inam to the Dharmasanamdars. The Inam was confirmed in favour of the Devasthanam for the 80 shares and Inam Title Deed No. 794 was issued. For the Dharmasanamdars another title deed was issued, both Inams having been confirmed separately. Inasmuch as the confirmation was made in different portions, the village is not an estate under the Madras Estates Land Act. Consequently the provisions of the Madras Estates Land Reduction of Rent Act and the Madras Estates (Abolition and Conversion into Ryotwari) Act do not apply to the suit village. The Settlement Officer held in an enquiry that the grant not being of a whole Inam village, the suit village was not an Inam estate. In spite of the said decision, the Government issued a Notification under the Madras Act XXX of 1947 in respect of the suit village. The plaintiff filed C.M.P. No. 12038 of 1950 on the file of this Court to issue a writ of *certiorari* and to quash the proceedings taken by the Government under the Rent Reduction Act. This Court dismissed the application holding that the Rent Reduction Act was not *ultra vires* and indicated that merits of individual cases might be decided in separate suits. The Advocate-General waived notice under section 80, Civil Procedure Code. Defendants 2 to 20 got impleaded on their own motion for themselves and as the representatives of all the tenants in the suit village.

The case for the State of Madras and the tenants was that the Inam village of Venkatankurichi, the grant of which has been recognised and confirmed by the British Government, is an estate as defined in section 3 (2) (*d*) of the Madras Estates Land Act and that the decision of the Settlement Officer affects only the question of taking over the village under the Madras Act XXVI of 1948, that the notification issued by the Government under Act XXX of 1947 is not affected by reason of the decision of the Settlement Officer, that the village is an estate and as such the Rent Reduction Act is applicable, that there are ryoti lands in the suit village and in respect of such lands Act XXX of 1947 is applicable and that the Notification issued under the said Act is legal and valid and the Government have the right to collect the rent.

The point for determination is whether what has been granted to the plaintiff Devasthanam is an estate within the meaning of the Madras Estates Land Act. It would be an estate if originally the entire village was granted to the Devasthanam. On the other hand, it would not be an estate if what was granted to the Devasthanam was only a part of the village.

The learned Subordinate Judge held that what was granted was a named village and that the whole village was granted in Inam to Sri Rameswaram Ramanathaswami and that subsequent to the grant a portion of the village became a Dharmasanam and that therefore the original grant constituted an estate within the meaning of section 3 (2) (*d*) of the Madras Estates Land Act, I of 1908. On appeal the learned District Judge held that there is nothing to show that either the Dharmasanam portion came out of the Devasthanam portion or the Devasthanam portion came out of the Dharmasanam portion and that the only reasonable conclusion was that there were two grants, one in favour of the Devasthanam consisting of 80 out of 84 shares and the other in favour of the Dharmasanamdars consisting of 4 out of 84 shares. Therefore, he allowed the appeal and decreed the plaintiff's suit. Hence these second appeals by the defeated defendants.

In these second appeals I am of the same opinion as the learned District Judge and here are my reasons.

In this case the only document available—the original grant being not available—is an extract from the Fair Inam Register. In column 1 of the register after deducting the Poramboke and after showing the remainder to be Acs. 1294-64 we find the following significant descriptions :

" Devadayam 80 shares ; Dharmasanam 4 shares ".

In column 8 against "Devadayam 80 shares" we find the description "for the support of the pagoda of Sri Ramanathaswami now efficiently kept up" and as against " Dharmasanam 4 shares" we find the description "Dharmasanam". Again, in

column 10, what is found against "Devadayam 80 shares" is "permanent" and what we find against "Dharmasanam 4 shares" is "hereditary". In column 12 as against the "Devadayam 80 shares" we find entered "account of fasli 1211, account of A.D. 1815, account of fasli 1244" and as against "Dharmasanam 4 shares" we find entered "Karaimal account of Kilaka corresponding to A.D. 1788". Then in column 13 "name of the original grantee" we find as against "Devadayam 80 shares", "Sri Ramanathaswami" but as against "Dharmasanam 4 shares" we find it left blank implying that the original grantee was not known. But, in the next column, we find as against "Dharmasanam shares", "as per Karaimal account, Kasturi Rengier". Finally, in column 22 "decision of the Inam Commissioner or his assistant" we find the following :

"It is proved that four shares out of this village have been enjoyed by the agraharamdars from before the Permanent Settlement. Two title deeds will be granted as recommended by the Deputy Collector. The Devadayam portion is confirmed on present tenure and the Dharmasanam portion in one. Title deed to the Agraharamdars on a quit rent of Rs. 15 exclusive of jodi. In future the jodi on this portion of the village will be paid direct to the Zamindar."

To sum up the foregoing, according to the entries found in the fair Inam Register there was not a single grant of the whole village either to the Devasthanam or to the Dharmasanamdars, but two different and distinct grants, one of 80 shares and the other of 4 shares, the former being in favour of the Devasthanam and the latter being in favour of the Dharmasanamdars.

This conclusion is corroborated by the account of the history of these grants given in the fair Inam Register. It starts by saying :

"This is one of the villages in the Zamindary of Ramanathapuram. This was granted by one of the ancestors of the Rani of the Zamindary for the support of the temple of Sri Ramanathaswami as it is seen from the account of fasli 1211 of A.D. 1815. The object of the grant is to worship all the gods in the temple and to perform certain festivals for the God of Ramanathaswami, etc. The object of the grant is efficiently kept up and the Temple, in producing usual statement register, etc., in the office, deducted the undermentioned lands as Dharmasanam portion of the Mahajanams in column 16 : 1 wet Ac. 31-98 ; 1 dry Ac. 53-10 ; Total Ac. 85-08."

Then it says :

"The vakil further pleaded that the above lands are enjoyed by the families of the Mahajanams from time immemorial or from the date of the formation of the grant. He again relinquished the right of the temple for the lands recorded here as Dharmasanam portion of the village. The Mahajanams argue that the Karaimal accounts or lists of the Vritties of Virodhi year or A.D. 1768, Akshya or A.D. 1745 or Kilaka or A.D. 1788 which are in their present possession show that formerly or originally the entire village was Dharmasanam and that 80 Vritties out of 84 comprising the village were sold gradually to the Devasthanam ".

Then after referring to the karaimal accounts produced by the Dharmasanamdars it is stated :

"They bear the signatures of the karnams of those days. I find no reason to suspect their genuineness though there is no evidence to prove them to be genuine documents......These receipts are on plain cadjan leaves. They bear the signatures of taluk officials in some cases, Devasthanam officials in several cases. These documents do not show the extent of the Dharmasanam portion but they display that a portion of this village is Dharmasanam from time immemorial. It is proved satisfactorily from the statement of the vakil of the trustee of the Devasthanam and from the accounts, etc., produced by the Mahajanams that a portion of this is enjoyed always as Dharmasanam......From the above circumstances it is evident that the entry in the account of fasli 1211 and 1815 regarding the village is wrong and that by some mistake or other the entire village was entered in the standard account just alluded as Devasthanam. Hence I recommend to confirm the Devasthanam portion upon that institution and the Dharmasanam portion upon the Mahajanams in Col. 16. The karaimal accounts, etc., further show that these Mahajanams are descendants of the original grantee. It is usual to occur mistakes of this nature in the standard accounts as it was found to be in Vizagapatam and other districts."

Lower down we find :

"The Dharmasanam and Devadayam lands are distinct from each other. There are recognised boundaries between these lands .... The results of my enquiry show that the boundaries are given by the vakil of the trustee and the Mahajanams. The Dharmasanam portion itself should be considered to consist of four equal Vritties and that they are enjoyed as shown in the margin of the first sheet."

To sum up the foregoing, the Inam Register makes two things perfectly clear : One is that although the entire village was entered in the name of the Devasthanam in the accounts of fasli 1211 or A.D. 1815, the entry was wrong, and the other is that from time immemorial and always so far as the evidence before the Inam Commissioner went, the Dharmasanam portion which consisted of four Vritties and which was distinct from the Devasthanam portion of 80 Vritties was being enjoyed by the Dharmasanamdars, while the Devasthanam portion of 80 Vritties alone was being enjoyed by the Devasthanam.

The proof of the pudding is after all in the eating. On the materials available the Inam Commissioners issued two separate title deeds, one in favour of the Devasthanam for 80 vritties and the other in favour of the Dharmasanamdars for four Vritties.

On these facts can it be said that there is proof in this case that the original grant to the Devasthanam consisted of the entire village? There is no proof whatever that the original grant consisted of the entire village in favour of the Devasthanam and that the Dharmasanam portion came out of it by a subsequent grant and there is nothing to show that the entire village was granted in favour of the Dharmasanamdars and that the 80 Vritties in favour of the temple came out of this subsequently by sale and purchase. The possible conclusion that can be drawn is that there were two grants one consisting of 80 out of 84 Vritties and the other consisting of 4 out of 84 Vritties, the former in favour of the Devasthanam and the latter in favour of the Dharmasanamdars.

In such circumstances, neither the Devasthanam portion of the village nor the Dharmasanam portion of the village can be held to be an estate. The point is concluded by authority. In *The District Board of Tanjore* v. *Noor Mohammed*[1], the Supreme Court laid down that in order to come within the scope of the definition of an estate, the grant must fulfil the following conditions ; (*a*) the words of the grant should expressly and not by implication make it a grant of a particular village as such by name and not a grant of a defined specific area only ; and (*b*) that the area, if any, excluded, had already been granted for service or other tenure or it had been reserved for communal purposes. It was also pointed out that where in a village two blocks of land are held under two separate grants by two different persons and they were recognised under two separate title deeds by the British Government, neither of the blocks could be held to be an estate within the meaning of the Estates Land Act. I may also refer here to another important observation in the above decision, *viz.* :

" Any inam village in section 3 (2) (*d*) means whole village granted in inam and not anything less than a village however big a part it may be of that village."

The burden of proof that a certain land constituted an estate is clearly upon the party who sets up the contention and the following observations in *Andiappa Pillai* v. *State of Madras*[2], have been rightly referred to by the learned District Judge as apposite in this context :

" The only document filed in the case is the Inam Fair Register. The Inam Fair Register shows the history of the grant. The village was situate in the zamindari of Ramanathapuram. Half of the village was granted for the support of Sri Adi Jagannathaswami in Tiruppullanai and the remaining half as Dharmasanam. The former grant was a permanent one and the latter was a hereditary grant. Column 11 of the Inam Fair Register indicates that the name of the grantor in regard to one-half is not known whereas the name of the other grantor is given as Reghunatha Sethupathi. Column 8 shows that one-half was granted to Dharmasanam and the other half for the support of Adi Jagannathaswami. From the recitals of the document it is manifest that the grantors, the grantees and the purpose of the grant were all different. The Inam Commissioners confirmed the grant to two different persons and issued separate title deeds. On these facts, it is not possible to hold that the Dharmasanam grant with which I am now concerned is grant of a whole inam village at the time it was made".

The learned District Judge has rightly repelled the two contentions put forward by the defendants. It was first urged on the foot of the evidence of the karnam who has been in office for ten years that the Devasthanam lands and the Dharmasanam

1. (1952) 2 M.L.J. 586 : A.I.R. 1953 S.C. 446. 2. (1953) 1 M.L.J. 112.

lands are now found intermixed. But we have the clear record of the Inam Commissioner that the Dharmasanam and Devadayam lands are distinct from each other and there are recognised boundaries between those lands. Therefore, at the time of the Inam Commission, which is the state of affairs to be taken into consideration for determining this question, the lands were not found mixed up. If they got subsequently mixed up, it may be due to subsequent purchases and sales and concerning which we have no information. Secondly, once again on the evidence of that Karnam it was urged that the Dharmasanam have paid poruppu to the Devasthanam and that the Devasthanam was collecting fishery rent from the Dharmasanamdars. But as pointed out by the learned District Judge, the evidence of the Karnam is very limited and what is more, contradictory. In one place he has stated that the Devasthanam pays the entire poruppu to the Samasthanam and in another place he stated that the Dharmasanamdars did not pay any portion of the poruppu. Then in regard to the fishery rent, he stated in one place that the Devasthanam collects the fishery rent from the ryots and that such rent would be shown in their patta, that the Dharmasanamdars also pay the fishery rent and that they would be given patta separately for the fishery rent. But in another place he stated that to the Dharmasanamdars the Devasthanam does not issue patta. In these circumstances it is impossible to state that the title of the Dharmasanamdars must be held to be derivative from the Devasthanam. In any event, the fact that some fishery rent or poruppu was paid by some of the Dharmasanamdars to the Devasthanam will be wholly inconclusive for there is no evidence to show what the circumstances were under which those payments came to be made.

The net result of this analysis is that the decree and judgment of the learned District Judge are unassailable and they are confirmed, and these second appeals have got to be dismissed and are hereby dismissed with costs of the Devasthanam in S.A. No. 134 of 1955. There will be be no order as to costs in S.A. No. 59 of 1955.

No leave.

P.R.N. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE GANAPATIA PILLAI.

M/s. Abdul Subhan Sahib & Sons .. *Appellant**

v.

State of Madras by Secretary, Home Department and another.. *Respondents.*

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), *section* 13—*Exercise of power of exemption under—When improper.*

In deciding whether a particular order of exemption made by the State Government under section 13 of the Madras Buildings (Lease and Rent Control) Act, 1949, is in conformity with the object and policy of the Act, the fact that the tenant was obtaining an unconscionable advantage at the expense of the owner of the property, *viz.*, by profiteering by sub-letting portions of the premises, is irrelevant. The Act provides a machinery by which it is open to the parties to have the fair rent fixed.

The Act no doubt takes away the unrestricted power of the landlord to evict tenants. But section 7 of the Act provides two sets of circumstances under which tenants could be evicted, *viz.*, that provided under sub-sections (2) and (3) of the section. In cases where a owner requires a non-residential building in the occupation of a tenant for his own use the policy of the Act is to deny the right of the landlord to evict a tenant unless the landlord himself does not occupy another non-residential building in the same city. Procuring a premises for a landlord for a purpose for which he

* Writ Appeal No. 72 of 1958.

1st May, 1959.
(11th Vaisakha of Saka 1880).

would not be entitled to evict a tenant under the provisions of the Act (where an express provision exists) could not be in furtherance of the object of the Act. The Act itself provides for reasonable grounds of eviction and if a particular case does not fall within the provisions of the Act permitting such eviction the exercise of the power of exemption under section 13 of the Act for achieving such eviction would not be a reasonable exercise of the power.

What constitutes an arbitrary exercise of power under the section has to be decided on the facts of each case. Taking irrelevant factors into consideration, taking into consideration a reason which the legislature, by reason of the specific provision in the Act, had decided is not a ground justifying eviction of a tenant, would be instances of arbitrary exercise of the power of exemption. The Act provides for certain grounds of eviction and it would not be open to the Government to add to these permitted grounds either on the score of inconvenience of the landlord or on the ground that the landlord has made fair proposals to provide alternative accommodation to the tenant.

Appeal under clause 15 of the Letters Patent against the Order of the Hon'ble Mr. Justice Balakrishna Ayyar, dated 30th June, 1958 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P. No. 275 of 1957 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records relating to G.O. Ms. No. 380, Home, dated 12th February, 1957, of the Government of Madras which exempted premises No. 6, Varasiddhi Vinayakar Koil Street, Periamet, Madras, from the operation of the Madras Buildings (Lease and Rent Control) Act of 1947 and to quash the said order.

T. Venkatadri, for Appellant.

The Additional Govrnment Pleader (*K. Veeraswamy*), on behalf of the State.

S. Venkatarama Iyer for *E. A. Viswanathan*, for 2nd Respondent.

The Judgment of the Court was delivered by

Ganapatia Pillai, J.—This appeal is directed against the judgment of Balakrishna Ayyar, J., in Writ Petition No. 275 of 1957. The Writ Petition was filed by the appellants before us, Abdul Subhan Sahib & Sons, for the issue of an appropriate writ to quash the order of the State of Madras, exempting premises No. 6, Varasiddhi Vinayakar Koil Street, Periamet, Madras, from the operation of the Madras Buildings (Lease and Rent Control) Act, 1949.

The appellants are lessees of the property, and it is stated in their affidavit that they have been in occupation of the property for nearly 40 years. The previous owner of the property was one C. Haji Abdul Karim Sahib. In 1952 he filed a petition before the Rent Controller to evict the present appellants from the premises. This proceeding ended in a compromise, as a result of which the appellants were allowed to continue in possession of the premises on payment of rent at the rate of Rs. 170 per mensem. In November, 1954, Abdul Wahid, the second respondent to the writ petition and the second respondent before us in this appeal, purchased this property. Thereafter, he is said to have effected repairs to the property and then made a demand for payment of higher rent. The parties did not agree. Thereafter, on the 14th February, 1956, the second respondent presented a petition to the Minister in charge of accommodation, Government of Madras, requesting the Government to exempt the premises (No. 6, Varasiddhi Vinayakar Koil Street, Periamet, Madras) from the operation of the provisions of the Madras Buildings (Lease and Rent Control) Act of 1949. The reasons he gave in that petition for this request will be dealt with presently. The Government, after hearing the objections of the appellants, the tenants, passed an order in G.O. Ms. No. 380, Home, dated 12th February, 1957, exempting the premises from the operation of the Act. The order runs thus :

"Premises No. 6, Varasiddhi Vinayakar Koil Street, Periamet, Madras, belongs to Sri M. R. Abdul Wahid, a merchant doing business in hides and skins at premises No. 26 in the same street, which is also owned by him. The entire downstairs portion and upstairs portion newly constructed of premises No. 6, V. V. Koil Street is under the occupation of Nagal Abdul Subhan & Sons on a monthly rent of Rs. 170. They have sublet one-third of the premises to two sub-tenants and are realising a rent of Rs. 150 per mensem from the sub-tenants. Hence for the two thirds of the portion occupied by Sri N. Abdul Subhan Sahib & Sons they are paying only a rent of Rs. 20 per mensem. The landlord has applied to the Government for grant of exemption of the premises from the provisions of the Madras Buildings (Lease and Rent Control) Act, 1949, on the ground that he purchased the premises for a sum of Rs. 25,000 for the specific purpose of re-starting his commission mandi business and that the present premises he is living in is unsuitable for this business and that, therefore, he

needs the premises for his own occupation and use. The Government have carefully examined the request made by the landlord and they have decided to exempt premises No. 6, V. V. Koil Street, Periamet, Madras, from all provisions of the Act."

It is common ground that on 15th December, 1956, a few months before the order of the Government, the concerned Minister inspected the premises.

The attack against the validity of this order of the Government is based on the contention that the Government had exercised the discretion vested in them under section 13 of the Act in disregard of the standards or contrary to the declared policy and object of the legislation or arbitrarily or *mala fide*. The learned Judge, Balakrishna Ayyar, J., did not sustain this objection, because in his view there was no *mala fide* exercise of the power vested in the Government in granting exemption in this case. In coming to this conclusion, the learned Judge relied upon a Bench decision of this Court in *Globe Theatres* v. *State of Madras*[1]. The constitutional validity of the provisions in section 13 of the Act was attacked before that Bench. In upholding the validity of the provisions, one of us a member of that Bench observed :

" In my opinion, the policy and object of the enactment have been sufficiently indicated so as to enable the Government to exercise the power conferred by section 13 of the Act in specific cases not inconsistent with and in furtherance of such policy and object ".

Balakrishna Ayyar, J., followed this statement of the law, and applying it, held that the Government had not contravened this principle in granting exemption to the premises in question. His reasons for this conclusion may be stated in his own words thus :

" Undoubtedly the petitioners have sublet a substantial portion of the building for a rent of Rs. 150 with the result that for the portion they actually occupy they were paying only a rent of Rs. 20. This averment in the order of the Government is not contradicted in the affidavit filed by the petitioners. The position therefore is that the petitioners are obtaining an unconscionable advantage at the expense of the owner of the property, The object and purpose of the Act is to protect tenants from being rackrented and improperly evicted, it is not intended to enable them to profiteer. The purchaser of the property wanted the building for the specific purpose of re-starting his commission mandi business and his case was that the premises he is living in is unsuitable for the purpose."

Of the two reasons given by the learned Judge, the first, namely, that the petitioners are obtaining an unconscionable advantage at the expense of the owner of the property, appears to us, with all respect to the learned Judge, irrelevant. The provisions in the Act enable both the tenant and the landlord to file application before the Rent Controller for fixing fair rent for premises let. It is true that the mode in which fair rent should be fixed is indicated in the relevant provisions of the Act, but we were not informed that by that mode of fixing the fair rent the landlord in this case would not be able to get an increase in the rent payable by the appellants. Mr. Venkatrama Iyer, the learned counsel for the second respondent, made no attempt to support the order of the learned Judge on this ground.

The second ground mentioned by the learned Judge is that the purchaser of the property wanted the building for the specific purpose of re-starting his commission mandi business and the premises he was living in was unsuited for the purpose. Assuming this purpose to be a real one which animated the landlord to evict the tenants, we have to see whether this would fall within the scope of the power vested in the Government under section 13 of the Act. In *Globe Theatres' case*[1], the law was stated thus :—

" If the policy and object of the Act can be discovered within the four corners of that Act including the preamble, and discretion is vested in the Government to make a selection in furtherance of that policy and object for the application of the Act, then the provision conferring such power is not void as offending Article 14 of the Constitution. *If such power is improperly exercised in any particular case, that is, not in furtherance of the policy and object of the Act, but arbitrarily, then the Court can strike down the exercise of such power on every such occasion.*" (Italics ours.)

This decision further lays down that the two main objects of the Madras Buildings (Lease and Rent Control) Act, 1949, are (1) the control of rent, and (ii) the regulation of letting with a view to prevent unreasonable eviction of tenants. The Act takes away the unrestricted power of the landlord to evict tenants. However, the landlord is not left without remedy in this matter because the Act specifies in section 7 two sets

1. (1954) 2 M.L.J. 110 : I.L.R. (1954) Mad. 616.

of circumstances alone which would enable the landlord to obtain eviction of a tenant. These circumstances are set out in sub-sections (2) and (3) of section 7. Sub-section (2) sets out six causes enabling the landlord to evict a tenant. They fall under what we would call acts of omission and commission of the tenant like default in payment of rent, sub-letting the property without consent of the landlord, using the building for a purpose other than one for which it was let out, committing acts of waste likely to impair the value or utility of the building, committing acts which are a nuisance to the occupiers of the other portions of the same building, ceasing to occupy the building for a period of four months and denying the title of the landlord. We are not concerned in this case with this group. Sub-section (3) of section 7 enables the landlord to evict a tenant for a different cause. In the case of a residential building this sub-section provides that the landlord could evict a tenant if he himself is not occupying a residential building of his own in the city concerned. In the case of a non-residential building the landlord is similarly entitled to evict a tenant, if he is not occupying, for the purpose of business which he is carrying on any non-residential building in the City concerned. A separate provision is made in this sub-section to cover the case of a landlord who is occupying only a part of a residential or non-residential building. In that case he is entitled to apply for an order to evict the tenant occupying the remaining part of the building only if he satisfies the Authority that he requires additional accommodation for residential purposes or for the purposes of business.

Obviously, the provision as to the occupation of a part of building by the landlord does not apply here. The only provision which applies is the right given to the landlord to requisition a non-residential building on the ground that he is not occupying any other non-residential building in the City for the purpose of his business. The policy of the Act, as could be seen from these provisions, is to deny the right of the landlord to evict a tenant from a non-residential building, unless the landlord himself does not occupy another non-residential building in the same city. If he does occupy such a non-residential building, the legislature has debarred him from getting possession of a non-residential building in the occupation of a tenant. Mr. Venkatarama Iyer, the learned counsel for the second respondent, pointed out that in a case where the landlord was occupying a non-residential building of his own in the City but found such a building insufficient for his requirements, there was no provision in the Act to enable the landlord to evict the tenant, and that the only provision which gave power to the landlord to evict a tenant occupying a non-residential building was found in clause (*c*) of sub-section (3) of section 7 which dealt with a case of part occupation of premises by the landlord along with a tenant. Clearly, he argued, there was no provision in the Act dealing with a case like the present one, and if the Government felt that serious injustice was caused to the landlord by being denied possession of the premises in the occupation of this tenant, they could exercise the power vested in them under section 13 of the Act.

There is a fallacy underlying this argument. As already pointed out by us, the decision in *Globe Theatres' case*[1], has laid down that the power given to the Government to exempt any premises from the operation of the Act could only be exercised in furtherance of the object of the Act and should also be in consonance with the policy of the Act. We have also already pointed out that the two main objects of the Act are the control of rents and the regulation of letting with a view to prevent unreasonable eviction of tenants. We fail to see how procuring the premises for the landlord for a purpose for which he is not entitled to evict a tenant under the provisions of the Act, would be in furtherance of the object of the Act. Of course, regulation of letting of a premises includes not only prevention of unreasonable eviction of tenants but also permitting reasonable eviction. The Act itself provides for such reasonable eviction. If a particular case does not fall within the provisions of the Act permitting such eviction, we are unable to hold that exercise of power of exemption by the Government under section 13 for achieving such eviction would be a reasonable exercise of power.

1. (1954) 2 M.L.J. 110 : I.L.R. (1954) Mad. 616.

What constitutes arbitrary exercise of the power vested in the Government under section 13 could not be defined in an abstract manner. The more reasonable course would be to examine every instance of the exercise of such power to find out whether it was arbitrary or not. In this connection we would point out that arbitrariness consists not only taking into account an irrelevant consideration as justifying the exercise of the power but also taking into account a reason, which the legislature by reason of the specific provisions in the Act had decided was not a ground justifying eviction of a tenant by the landlord.

Going back to the two reasons given by the learned Judge in his order, we have already pointed out that the fact of the tenant making any unconscionable advantage over the transaction would not be any ground justifying exercise of the power vested under section 13. A remedy is provided under the Act for such specific evil, and the landlord should be left to pursue that remedy. The second ground, namely, that the landlord requires the premises in question for the purpose of his business since the premises which he is already occupying is unsuitable, is one which is not permitted as a ground for eviction under the provisions of the Act but is also not in furtherance of the policy underlying the Act. We would point out that regulation of letting out of premises is one of the objects of the enactment, and the end sought to be achieved is to prevent unreasonable eviction of tenants. The Act does categorically lay down the only grounds permissible for eviction of tenants. Under the circumstances it would not be open to the Government to add to these grounds either on the score of inconvenience of the landlord or on the ground of fairness of the proposal put forward by the landlord for alternate accommodation to the evicted tenant. Counsel for the second respondent argued that his client, the landlord, was very fair in this case, because he offered alternate accommodation to the tenants, which the tenants unreasonably refused to accept. This ground is not specifically relied on by the Government in their order. The order, however, states that the landlord purchased the premises in question for a sum of Rs. 25,000 for the specific purpose of restarting his commission mandi business and that the present premises in which he is living is unsuitable for his business. We need hardly point out that this circumstance is entirely irrelevant. Differing from Balakrishna Ayyar, J., we are of opinion that the order of the Government is the result of arbitrary exercise of the discretion vested in them under section 13 of the Act, and it should be quashed.

This appeal is allowed. Rule *nisi* is made absolute with costs of appeal payable by the the second respondent. Advocate's fee Rs. 150.

R.M. —————— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE GANAPATIA PILLAI.

State of Madras by Collector of Tanjore .. *Petitioner**

v.

T. S. Venkataswamy Naidu, Managing Trustee of Sri Krishna Annamudham .. *Respondent.*

Madras Estates (Supplementary) Act (XXX of 1956), *section* 4—*Delay in filing an application under—If could be excused by the Special Appellate Tribunal.*

Limitation Act (IX of 1908), *section* 5—*If applicable to proceedings under the Madras Act (XXX of* 1956).

There is no specific provision in the Madras Estates (Supplementary) Act, 1956, which confers jurisdiction on the Special Appellate Tribunal to condone any delay in filing an application under section 4 of the Act nor has the Tribunal any inherent jurisdiction to excuse the delay in filing an application before it. The provisions of section 5 of the Limitation Act could not be invoked in such cases as they would not fall within any of the categories in the section.

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* S.T.P. No. 11 of 1959 in (S.T.A. No.—1959.) 13th July, 1959.
(22nd Ashada, 1881—Saka).

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to excuse the delay of 5 days in filing S.T.A. No. 59 S. R. 21323 sought to be preferred to the High Court against the Order of the Estates Abolition Tribunal, Vellore, in A.S. No. 79 of 1955.

The Government Pleader (*K. Veeraswami*), for the Petitioner.

R. Sundaralingam, for Respondent.

The Order of the Court was made by

Rajamannar, C.J.—This arises out of an application by the State of Madras filed under section 4 (2) (*b*) of Madras Act (XXX of 1956) to set aside the decision of the Estates Abolition Tribunal, Vellore, in A.S. No. 79 of 1956 from the decision of the Settlement Officer, No. IV Tiruchirapalli, dated 15th November, 1950. The order of the Estates Abolition Tribunal was passed on 15th September, 1956. Madras Act (XXX of 1956) came into force on 3rd August, 1957. The application by the State was filed on 6th August, 1958. Section 4 (1) which confers the right on the Government to file an application to set aside the decision of the Settlement Officer or the Tribunal constituted under the Abolition Act prescribes a period of one year from the date the Act, that is, Act XXX of 1956, came into force. Such an application, if preferred against the decision of a Settlement Officer, lies to the appropriate Tribunal, and in other cases to the Special Appellate Tribunal constituted under section 7. Section 4 (2) (*b*) provides that such an application shall be dealt with as an appeal under the said section, that is section 7. Section 7 deals with appeals to the Special Appellate Tribunal from the decision of a Tribunal appointed under Act XXX of 1956. Obviously what is contemplated under section 4 (2) (*b*) of the Act is that appeals to the Special Appellate Tribunal against Tribunals constituted under the Abolition Act will also be dealt with on the same footing as appeals against tribunals appointed under Madras Act XXX of 1956, and the same procedure would govern the disposal of the applications filed under section 4 of Act XXX of 1956.

The present application by the State has been filed beyond the prescribed time. There has been a delay of three days. Admittedly there is no specific provision in Madras Act XXX of 1956 itself which confers jurisdiction on the Special Appellate Tribunal to condone any delay in filing the application under section 4 of the Act. Undoubtedly the Special Appellate Tribunal as such has no inherent jurisdiction to excuse the delay in filing an application to it. The learned Government Pleader had therefore perforce to rely on section 5 of the Indian Limitation Act. That section runs thus :

> " Any appeal or application for review of judgment or for leave to appeal or any other application to which this section may be made applicable by or under any enactment for the time being in force may be admitted after the period of limitation prescribed therefor when the appellant or applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period."

The *Explanation* to this section is not material. Now the present application under section 4 of Madras Act XXX of 1956 is not an appeal or application for review of judgment for leave to appeal within the meaning of those expressions in section 5 of the Limitation Act. They are appeals and applications which are governed by the entries in the First Schedule to the Limitation Act and which are based on the provisions of the Code of Civil Procedure. There is one other category covered by section 5, namely "any other application to which this section may be made applicable by or under any enactment for the time being in force". Madras Act XXX of 1956 does not make section 5 of the Limitation Act applicable to applications under section 4 of that Act. It follows that the present application does not fall within any of the categories mentioned in section 9 of the Limitation Act and, therfore, the provisions of that section cannot be invoked to save the application from the bar of time. We hold that the Special Appellate Tribunal has no power to condone the delay in filing the application. Hence the application is dismissed. No costs.

R.M. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

Royal Printing Works by Proprietor P. Radhakrishanan .. *Petitioner**

v.

The Industrial Tribunal, Madras and another .. *Respondents.*

Industrial Disputes Act (XIV of 1947)—Disciplinary proceedings leading to dismissal of employee by the Management—Jurisdiction of the Industrial Tribunal to interfere—Scope and extent of—Writ under Article 226 of the Constitution.

In the absence of any evidence to support the charge made against the employee and where the Industrial Tribunal found that the enquiry conducted by the management was defective the award of the Tribunal ordering reinstatement of the dismissed employee cannot be set aside.

The Industrial Tribunal should not convert itself into a Court of first instance for disciplinary proceedings. The Tribunal has merely to determine whether there was any want of good faith on the part of the Management, whether there was any unfair labour practice, or any violation of the principles of natural justice or the finding was baseless or perverse.

The view that carelessness on the part of the employee in relation to his work would not justify serious punishment has to be disagreed with.

Messrs. Indian Iron & Steel Co. v. *Their Workmen*, (1958) S.C.J. 285, referred.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in I.D. No. 2 of 1958, dated 14th February, 1958, on the file of the Industrial Tribunal, Madras and quash the said order.

T. M. Krishnaswami Ayyar for *M. P. Sundararajan*, for the Petitioner.

S. Mohan Kumaramangalam and *K. V. Sankaran*, for 2nd Respondent.

The Additional Government Pleader (*K. Veeraswami*) for 1st Respondent.

The Court made the following

ORDER.—The proprietor of the Royal Printing Works, a printing establishment of Mount Road, is the petitioner. In October, 1957, he passed an order dismissing one Manickam, a watchman then in his employ. In December, 1957, he dismissed another Kuppuswami who was working in the composing section. In respect of both these matters and certain others, industrial disputes were raised which were referred by the Government of Madras for adjudication to the Industrial Tribunal, Madras. So far as Manickam and Kuppuswami are concerned, the Tribunal passed an order on 14th February, 1958, directing their reinstatement. The present petition has been filed for the issue of an appropriate writ to quash this order of the Tribunal.

The case relating to Manickam may be first disposed of. He was a watchman in the printing establishment of the petitioner from January, 1957. On 27th September, 1957, another employee named Balaraman reported to the proprietor that he had seen Manickam taking an aluminium vessel from the machine section and hiding it near a wall and, that it was subsequently taken away by a woman. Manickam was therefore suspected of having removed some property belonging to the press. On 5th October, 1957, charges were framed against him to the effect that he had removed some type-material in that vessel. The enquiry was posted for 15th October, 1957 and the management wrote to Manickam telling him that the enquiry had been

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*Writ Petition No. 374 of 1958. 8th April, 1959. (18th Chaitra of Saka 1881.)

fixed for that date. On that date Manickam wrote to say that he had not received a copy of the charges. The management then sent a memo. of charges by registered post fixing 25th October, 1957, as the date for the enquiry. But that letter was returned by the post office. On 25th October, 1957, Manickam did not appear at the enquiry. The management thereupon dismissed him. The Tribunal observed :

> " It will thus be seen that Manickam had no knowledge of the enquiry ; and further during the enquiry, there was utterly no evidence to show that Manickam was guilty of theft ".

The Management did not find that Manickam had evaded the receipt of the notice sent to him by registered post. Nor was there any evidence to that effect. The conclusion of the Tribunal, therefore, that Manickam had been dismissed without a proper enquiry cannot be disturbed. The writ petition so far as he is concerned must be dismissed.

I now go to Kuppuswami. He had been working in the Royal Printing Works for seven years, and, at the relevant time, he was in charge of the Job Section. On 28th September, 1957, the management framed three charges against him. The University of Madras had placed an order with this firm for printing hall tickets for Intermediate Examination. The first charge against Kuppuswami was that on these hall tickets instead of printing the conditions relating to the Intermediate Examination, conditions relating to the Pre-University Examination were printed. The second charge was that instead of printing only on one side of the paper the "tabulated result forms" of the University, he had them printed on both sides. The third charge was that while printing " cheque-covering-letters" on behalf of the Udipi Hotel a mistake was made, Udipi Hotel being printed at the top and States Hotel at the bottom.

On 1st October, 1957, Kuppuswami submitted his explanation. The proprietor held an enquiry on 4th October, 1957 and on 11th December, 1957, he passed an order terminating the services of Kuppuswami. When the matter went before the Tribunal it recorded the evidence of some witnesses and reached the conclusion that there was no material on which Kuppuswami could be found guilty. It also found that the procedure adopted by the management was wrong in various ways.

Mr. T. M. Krishnaswami Ayyar, the learned advocate for the petitioner, first contended that the Tribunal was in error in treating the matter as though it were itself trying the issue whether Kuppuswami was guilty or not of the charges that had been framed against him and that, it had no jurisdiction to take evidence to decide that question for itself. He referred to the decision of the Supreme Court in *Messrs. Indian Iron & Steel Co.* v. *Their Workmen*[1], where the scope of the powers and duties of an Industrial Tribunal in a proceeding of this kind has been explained.

> "Undoubtedly the management of a concern has power to direct its own internal administration and discipline ; but the power is not unlimited and when a dispute arises, Industrial Tribunals have been given the power to see whether the termination of service of a workman is justified and to give appropriate relief. In cases of dismissal on misconduct; the Tribunal does not, however, act as a Court of appeal and substitute its own judgment for that of the management. It will interfere (i) when there is a want of good faith, (ii) when there is victimisation or unfair labour practice, (iii) when the management has been guilty of a basic error or violation of principles of natural justice and (iv) when on the materials, the finding is completely baseless or perverse."

Mr. Mohan Kumaramangalam, however, argued that an Industrial Tribunal has jurisdiction to take whatever evidence it considers necessary to decide the issue before it, and, that in taking evidence to decide whether Kuppuswami was guilty of the charges framed against him or not, the Tribunal was not acting in excess of its jurisdiction. I have no doubt that an Industrial Tribunal has jurisdiction to take all the evidence it considers necessary to determine the questions it is called upon to decide. But, in the present case, the Tribunal went far beyond that. What it did was to convert itself into a Court of first instance for disciplinary proceedings. Instead

1. (1958) S.C.J. 285 : 1958 M.L.J. (Crl.) 266 : A.I.R. 1958 S.C. 130 at 138.

of merely determining whether there was want of good faith on the part of the management or whether Kuppuswami was the victim of unfair labour practice, or whether there has been a violation of any principle of natural justice, or whether on the materials the finding was baseless or perverse, instead of doing this, the Tribunal proceeded as though it were a Court trying the question for the first time. That it had no power to do. If the matter had stopped at this stage I would have been bound to set aside the order of the Tribunal so far as it relates to Kuppuswami. The Tribunal has, however, found that the enquiry against Kuppuswami was defective, and, in that respect its order stands on better ground.

It was explained to me that in the Petitioner's business, job printing, involved these processes. When an order was received the clerk who got it would hand it over to Kuppuswami. Kuppuswami, in his turn, would entrust the work to a compositor. The matter prepared by the compositor, which is called the rough correction proof, would be sent to a person called an examiner. After he had carried out the necessary corrections Kuppuswami would get back the corrected material and send it to the compositor who would prepare a clean proof. That clean proof would be sent to the person who has placed the order. After he had approved of it a third proof would be taken which is called the final strike proof That again would be sent to the examiner and after any further corrections he might make had been incorporated, the strike order would be issued and the material sent to the machine for being printed. The charges framed against Kuppuswami do not show for which of these various processes Kuppuswami was responsible and what the nature of his default was. In the evidence which the petitioner gave before the Tribunal he stated:

> " In all the three cases which form the subject-matter of charge Kuppuswami did not send the proof to the examiner but sent them to the machine."

If this was the real charge against Kuppuswami the Tribunal was right in observing that there was no evidence in support of it. The management did not record the evidence of any of the examiners. Alternatively, the various " proofs " relating to these charges must have been preserved and made available since they would have been in the nature of "material objects" and shown to some extent at least whether the relevant proofs were sent to the examiner or not. The proprietor admitted, " these proofs in regard to these three charges are not now available in my office ; and Kuppuswami must have preserved them, but I do not find them in the office." The position, therefore, is that there was no evidence to support the charge. The petition before me must fail in respect of Kuppuswami also.

There are certain passages in the order of the Tribunal which as I understand them suggest that carelessness on the part of an employee in relation to his work would not justify serious punishment. With this view I definitely disagree. Carelessness can often be productive of more harm than deliberate wickedness or malevolence. I shall not refer to the classic example of the sentry who sleeps at his post and allows the enemy to slip through. There are other more familiar instances. A compositor who carelessly places a plus sign instead of a minus sign in a question paper may cause numerous students to fail. A compounder in a hospital or chemist's shop who makes up the mixtures or other medicines carelessly may cause quite a few deaths. The man at an airport who does not carefully filter the petrol poured into a plane may cause it to crash. The railway employee who does not set the points carefully may cause a head-on collision. Misplaced sympathy can be a great evil. Carelessness and indifference to duty are not the highroads to individual or national prosperity.

In the result, the petition is dismissed, but, there will be no order as to costs.

V.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE GANAPATIA PILLAI.

C. R. Narasimhan .. *Appellant**

v.

M. G. Natesa Chettiar .. *Respondent.*

Representation of the People Act (XLIII of 1951), *sections* 77 *and* 123 (6)—*Mere omission to enter an expenditure in the account—If amounts to a corrupt practice under section* 123 (6).

On the plain language of sub-sections (1) and (2) of section 77, of the Representation of the people Act any failure on the part of a candidate to keep a correct account or to enter the necessary particulars in the account would not amount to incurring or authorising expenditure. Section 77 (3) clearly relates to expenditure as such because it says that the total of the expenditure shall not exceed the prescribed amount. If more than the prescribed amount is expended then such expenditure would be in contravention of that provision and would amount to a corrupt practice within the meaning of section 123 (6).

The mere omission to enter an expenditure and in contravention of sub-sections (1) and (2) of section 77 would not be a corrupt practice within the meaning of section 123 (6).

Appeal against the order of the Election Tribunal, Madurai II, dated the 30th September, 1958 and made in Election Petition No. 149 of 1957.

The Advocate-General (*V. K. Tiruvenkatachari*) and *V. P. Raman*, for Appellant.

Respondent not represented.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This is an appeal against the order of the Election Tribunal, Madurai II, setting aside the election of the appellant to the seat for the single member Parliamentary constituency of Krishnagiri on an election petition filed by the respondent (E. P. No. 149 of 1957). For the said seat there were five Candidates out of whom one withdrew. The appellant secured the largest number of votes and on 8th March, 1957, he was declared as the returned candidate. The respondent, M. G. Natesa Chettiar, an elector for the Krishnagiri Assembly Constituency which is one of the constituencies comprised in the Krishnagiri Parliamentary constituency, filed an election petition out of which this appeal arises praying that the election of the appellant be declared void and one G. D. Naidu who had secured the largest number of votes after the appellant be declared duly elected. The election of the appellant was sought to be set aside on several grounds which included charges of corrupt practices committed by the appellant. For the disposal of this appeal it is not necessary to mention all of them because the Election Tribunal found that excepting the corrupt practice to which we shall refer presently the election petitioner had not proved the commission of any other corrupt practice set out in the election petition. The material allegations in the election petition relating to the corrupt practice of which the Election Tribunal found the appellant guilty are as follows :—

"The petitioner states that the first respondent has incurred and authorised the expenditure in contravention of section 77 of the Act and committed a corrupt practice under section 123 (6) of the Act. He has incurred an expenditure of over Rs. 25,000. In his return of election expenses he has not taken into consideration the heavy expenditure incurred by the Congress Party in furtherance of his candidature. The Congress Party has incurred heavy expenditure of many thousands of rupees in furtherance of the prospects of the election of the first respondent and other Congress candidates who stood for election to the Assembly in the Krishnagiri Parliamentary Constituency. The expenditure has been incurred in various ways by the Congress Party by doing propaganda in support of the Congress Party candidates including meeting, processions, dances, dramas, feeding and many other diverse ways. I state that section 77 referred to in section 123 (6) of the Act provides that every candidate at an election shall either by himself or by his election agent keep a separate and correct account of all expenditure in connection with the election incurred or authorised by him or by his election agent between the date of publication of the notification calling the election and the date of declaration of the result thereof, both dates inclusive, that the account shall contain such particulars as may be prescribed and that the total of the said expenditure shall not exceed such amount as may be prescribed.

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* Appeal Against Order No. 255 of 1958. 19th February, 1959. (30th Magha, 1880—Saka).

The particulars which the accounts shall contain is provided for in Rule 131. The maximum amount of expenditure is provided for in Schedule III. Section 78 of the Act provides that the Return of Election Expenses shall be a true copy of the accounts kept by the candidate or by his election agents under section 77. The petitioner states that on an examination of the return of election expenses made by the first respondent it will be found that he has contravened the provisions of section 77 of the Act and therefore committed a corrupt practice under section 123 (6) of the Act. The first respondent has failed to conform to the provisions of section 77 and he has exceeded the maximum amount prescribed for expenditure for the election ".

The appellant traversed these allegations in paragraph 23 of his counter-statement which runs thus :—

" The statements in paragraph 31 that this respondent incurred or authorised expenditure in excess of the prescribed maximum are false and are denied. This respondent kept separate accounts of all expenditure in connection with the election as required by the rules. This respondent states that he is not concerned with any expenditure incurred by the Congress Party in furtherance of its election campaign all over the State and country. This respondent is advised and states that he is not obliged to include in his account items of expenditure neither incurred nor authorised by him. The petitioner has failed to state what exactly are the items of expenditure which he incurred or authorised and which ought to have formed part of his return and the allegation therefore lacks particulars. This respondent has submitted a correct statement of accounts, without violating any rules."

The appellant asked for particulars of the corrupt practice above mentioned, that is to say, the precise items of expenditure incurred or authorised by the appellant which according to the respondent (election petitioner) ought to have been included in the return of election expenses. The respondent furnished a list of such expenses. This list included seven items out of which it is sufficient to mention one because the Election Tribunal found that the respondent had failed to prove the other items. That one item is item No. 7.

" Expenses incurred for advertisement for canvassing votes by paintings on walls in Dharmapuri, Pennagaram, Papparapatti, Pallakode, Krishnagiri, Kaveripatnam and other places of major panchayat areas are not shown in the accounts."

Regarding this item the appellant in his counter-affidavit stated as follows :—

" Such expenses as I incurred for the advertisement by painting on walls in the constituency have been disclosed in the return. I submit that in any event no corrupt practice under section 123 (6) has been committed by me and I have not incurred expenditure in excess of the prescribed maximum."

Issue 8 which was raised on these pleadings runs as follows :—

" Whether the first respondent spent in connection with his election, any amount in excess of Rs. 25,000, whether the first respondent omitted to include in his account any item of expenditure actually incurred by him in connection with his election ; and whether he is guilty of a corrupt practice under section 123 (6) of the Act ?"

The corrupt practice set out in section 123 (6) of the Representation of the People Act, 1951, is

" The incurring or authorising of expenditure in contravention of section 77."

Section 77 is in the following terms :—

"*Account of election expenses and maximum thereof.*—(1) Every candidate at an election shall, either by himself or by his election agent, keep a separate and correct account of all expenditure in connection with the election incurred or authorised by him or by his election agent between the date of publication of the notification calling the election and the date of declaration of the result thereof, both dates inclusive ;

(2) The accounts shall contain such particulars, as may be prescribed ;

(3) The total of the said expenditure shall not exceed such amount as may be prescribed."

Evidence was adduced on the item of expenditure above-mentioned. In the course of the evidence, however, there was another item which was revealed and it was admittedly not included as such in the account of the appellant's election expenses, namely the charge for a telegram despatched by the appellant to Madras on or about 28th February or first of March. The Election Tribunal found the appellant guilty of corrupt practice under section 123 (6) of the Act in that he omitted (1) to include in the account of his election expenses two items of expenditure incurred by him and (2) to mention particulars thereof and obtain vouchers therefor, and contravened the provisions of section 77 (1) and (2) of the Act. He

also found that no attempt was made to prove the charge that the appellant had incurred an expenditure in excess of the maximum allowed by the rules. In the result though the election of the appellant was found to be free from many corrupt practices attributed to him the Election Tribunal found that he was bound to perform his statutory duty and declared the election void on the ground that the appellant had committed an offence which fell under section 123 (6) of the Act. The Tribunal, however, refused to grant the second prayer of the respondent, namely, that G. D. Naidu should be declared duly elected.

The learned Advocate-General who appeared for the appellant challenged the correctness of the findings of the Election Tribunal both on facts and on law. We shall first take up the question of fact and then deal with the question of law.

Item 7 of the list of items furnished by the respondent of the expenses alleged to have been incurred by the appellant and not included in the election expenses account relates to advertisement for canvassing votes by painting on walls in Dharmapuri, Pennagaram, Papparapatti, Pallakode, Krishnagiri and other places. The evidence regarding this item adduced by the respondent-election petitioner is as follows : The expenses incurred for wall painting in about 200 places throughout the constituency, each of which would have cost about Rs. 5. The painting was: "Vote for C. R. Narasimhan, Congress Candidate". P.W. 5, Mohanram spoke to his having seen the wall painting with the Congress symbol asking to vote for the appellant and that he had seen one Chandrasekhara Asari making such paintings. This Asari was not examined. P.Ws. 6, 8, 9 and 10 also speak to their having seen the wall paintings as an item of election propaganda of the appellant. The last witness gave the size of the painting as two feet by one foot. The appellant himself was examined as R. W. 3. The material portion of his deposition is as follows :—

" I have included in my account of election expenses the amount spent by me for making wall paintings of symbol, *viz.*, "Oxen". On 18th February, 1957, the amount incurred is debited. The amount is Rs. 50 and it was paid to Appadurai. Voucher No. 16 is the voucher taken from him. The painting is a simple affair and is what is called a tin stencil. The painting is made by two tin stencils one for the symbol of oxen of the file size namely 12 inches by 9 inches and the other a rectangular piece about 24 inches by four inches. The second rectangular piece contains my name. Rs. 50 is all the expenditure incurred by me in this matter and I have entered it in my account. No other expenditure was either incurred or authorised by me in this regard. I paid Rs. 50 in all to Appadurai for making tin stencil paintings. The amount includes both advance and final payment. I paid an advance and when the stencil was shown to me I paid the balance. It was a bargain for a lump sum and not so much a piece. Rs. 50 includes everything including preparation of the stencil. I did not ascertain in which of the towns and villages the prints were made. I saw the impression only in Krishnagiri. My request was to put such impression in all important towns in my constituency. He might have or might not have carried out my directions. I do not remember whether my second payment was after the work was finished or not. [Voucher No. 15 and No. 16 shown.]

Q.—I put it to you that these vouchers are for preparation of the tin stencil alone and do not include the paintings on the walls ?

A.—It is not so. The contract was for the execution of the entire work.

Q.—I put it to you that paintings were made on walls on your behalf in all important towns apart from the stencil impressions and that you have omitted from your account of election expenses the expenditure incurred in that behalf?

A.—I have included in my accounts all the expenditure incurred by me and I have not incurred or authorised any other expenditure. No paintings on walls apart from stencil impressions were made by me or at my instance or on my behalf."

Obviously if the sum of Rs. 50 admittedly entered in the account represents the total expenditure for the wall paintings then there is no omission to enter this item of expenditure in the account. The voucher which was produced relating to payment of Rs. 50 contains the following recital :—

" Tin stencils with pattern of symbol of oxen in connection with the general elections, inclusive of the charges for cutting 105 letters, Bill Rs. 50."

The Election Tribunal refused to accept the contention of the appellant that the voucher and the amount included the cost of painting of the walls. He considered that a sum of Rs. 50 was too small to cover the cost of tin boards, wages for cutting symbols and 105 letters, expenses for travelling to and in important towns

in the whole constituency, price of paint and charges for painting. The inference was that the expenditure incurred by the appellant for painting on the walls had been omitted to be included in the account kept by him and that, therefore, the appellant had contravened the provisions of sub-sections (1) and (2) of section 77 of the Act. Having perused the entire evidence bearing on the point we are unable to agree with the Election Tribunal. Though the title has been given as expenditure for the wall paintings it transpires that they were mere stencil impressions, which would not involve much time or labour or skill. We see no reason to disbelieve the appellant when he says that a sum of Rs. 50 was all that he expended in connection with the paintings on the walls. There is no proof that more was incurred by the appellant for this purpose. The stencils themselves were only tin plates. We accept the appellant's statement and hold that the respondent has failed to prove the omission to include any expenditure incurred on the wall painting other than what was included in the expenses account.

The next item of expenditure which the Election Tribunal held had been omitted to be included in the expenses account relates to a telegram sent by the appellant to a friend of his at Madras to bring a car for the purpose of the election. This item is not to be found in the list furnished to the Tribunal by the respondent. The basis for this charge is an alleged admission by the appellant himself in the course of his deposition. It is true that the appellant admitted having sent a telegram and that he might have omitted to mention the telegram by oversight. The matter was further elucidated in his re-examination in the following way :—

" *Q.*—Apart from inadvertence is there any other reason why the expenses for the telegram that you sent to your friend at Madras is not shown in the account of your election expenses ?

A. There could be one or two possibilities. I might have used whatever stamps I had already in my possession or any reply telegram form which I may have had or some one may have paid for it and may not have brought the bill to me and asked for the money. It might be that cash might not have at the moment passed from my pocket. At that moment I was working at a great strain."

A preliminary objection had been taken before the Tribunal that this item should not be considered at all as it was not averred in the petition or in the particulars but the objection was overruled as it was permissible to consider another instance of corrupt practice though it will not be permissible to consider a new head of corrupt practice. The Tribunal, further, was of the view that when the fresh instance was based on the admission of the party himself there could be no objection on the ground of the want of pleading in that regard. Accepting the validity of this legal position, if a finding has to be arrived at on the admission of a party it is well established that the admission has to be taken as a whole. The Election Tribunal though aware of this rule nevertheless held that the whole of the appellant's admission is contained in the answers given by him in cross-examination and that what was said the next day in re-examination cannot be tacked on to the previous day's admission and even if it be tacked on it does not detract from the guilt of the first respondent (appellant). In the first place we are unable to find any warrant for making an artificial division of a party's deposition according to the days on which the deposition was recorded. It is, of course, open to a Court or a tribunal to refuse to accept any statement made by a witness in his chief-examination, or cross-examination or re-examination. The Election Tribunal was wrong in saying that what was said the next day in re-examination could not be tacked on to the previous day's admission. In the second place we are unable to agree with the Tribunal that even if it be tacked on it would not detract from the guilt of the appellant. If stamps which were used for the telegram were stamps which he had already purchased and the costs of those stamps had been included under the general heading of " postage " there would in effect be no further expenditure to be included in the account of expenses. On the meagre evidence on the point we hold that it has not been established beyond all doubt that the expense incurred for sending the telegram in question was not included in the account.

In this view it is not necessary to deal with the question of law, namely, whether a mere omission to enter an item of expenditure in the expenses account would amount to a corrupt practice mentioned in section 123 (6) of the Act but as the matter was argued before us by the learned Advocate-General and there is a possibility of an appeal to the highest Court we shall deal with it. The corrupt practice in question is the incurring or authorising of expenditure in contravention of section 77. The gravamen of the offence is, therefore, the expenditure, that is, the act of spending in contravention of section 77. Section 77 which we have extracted above consists of three sub-sections. Sub-sections (1) and (2) relate to the keeping of an account of all expenditure in connection with the election. Sub-section (1) enjoins on the candidate the duty of keeping a separate and correct account and sub-section (2) lays down that such account shall contain such particulars as may be prescribed. Neither of these sub-sections relates to "expenditure", that is, spending money as such. An account obviously relates to a period after the incurring of the expenditure and it contains entries of expenditure already incurred or authorised to be incurred by the candidate. On the plain language of these two sub-sections we find it impossible to hold that any failure on the part of a candidate to keep a correct account or to enter the necessary particulars in the account would amount to incurring or authorising an expenditure. Sub-section (3), however, clearly relates to expenditure as such because it says that the total of the expenditure shall not exceed the prescribed amount. If more than the prescribed amount is expended then such expenditure would be in contravention of that provision and therefore in contravention of section 77. But any contravention of the provisions of sub-section (1) and sub-section (2) of section 77 would be not a corrupt practice which would fall within section 123 (6) of the Representation of the People Act because such contravention would not involve any incurring or authorising of expenditure.

We find that this view of ours has been taken by four other High Courts.

In *Sheopatsingh* v. *Harishchandra*[1], a Division Bench (K. N. Wanchoo, C.J., and Jagat Narayan, J.) of the Rajasthan High Court held that the mere non-maintenance of true accounts would not amount to a corrupt practice under section 123 (6) of the Act. The Tribunal had found in that case that the candidate had contravened sub-section (1) of section 77 in as much as he did not maintain a separate and correct account of the expenditure incurred or authorised by him in connection with the election between the date of publication of the notification calling the election and the date of declaration of the result thereof, and that such contravention would be a corrupt practice. The learned Judges refused to accept this construction of section 123 (6) and observed :—

"Under section 123 (6) it is only the incurring or authorising of expenditure in contravention of section 77 of the Act which amounts to a corrupt practice. The non-maintenance of true accounts has not been laid down as a corrupt practice. An entry is made in the account-book only after an expenditure is incurred or authorised. The corrupt practice consists of incurring or authorising of expenditure in contravention of section 77.

Only sub-section (3) of section 77 deals with the incurring or authorising of expenditure, for it lays down that the total amount of the said expenditure shall not exceed such amount as may be prescribed. It is only when the total expenditure exceeds this amount that it can be said that it has been incurred or authorised in contravention of section 77.

Section 124 (4) of the Act prior to its amendment by Act No. XXVII of 1956 provided that the making of any return which was false in any material particular would be a minor corrupt practice. The provision has since been deleted.

We are accordingly of the opinion that a contravention of sub-sections (1) and (2) of section 77 of the Act is no longer a corrupt practice. Nor is the submission of a false return of expenses a corrupt practice any longer".

The Madhya Pradesh High Court in *K. C. Sharma* v. *Election Tribunal*[2], explained the scope of section 123 (6) of the Act thus :—

1. A.I.R. 1958 Raj. 324. 2. A.I.R. 1958 M.P. 236.

" Where instances are cited to show that the prescribed maximum has been exceeded there may be a case under sub-section (3) of section 77 of the Act but the words " the incurring or authorising of expenditure " do not lead to the application of sub-section (2) or sub-section (1) of section 77 in the context of an election petition ".

In *Ram Abhilakh Tewari* v. *Election Tribunal*[1], the charge made against the successful candidate was that the return of the election expenses which he had filed did not show the correct account of the expenditure incurred and authorised by him as it contained fictitious and concocted entries. Dealing with the allegation the learned Judges of the Allahabad High Court said :—

" Such an allegation cannot be held to amount to a corrupt practice under section 123 (6) of the Representation of the People Act. Under that provision of law the corrupt practice consists in incurring or authorising expenditure in contravention of section 77 which can only happen if a candidate incurs or authorises expenditure in excess of the maximum amount allowable under the rules framed under section 77 (3) of the Representation of the People Act."

In Appeal No. 199 of 1958 (published in the Bombay Gazette, dated 18th September, 1958) Desai and Miabhoy, JJ., repelled an argument that failure on the part of a candidate to maintain a separate account with all the particulars required by rule 131 of itself amounts to a corrupt practice within the ambit of section 123 (6) thus :—

" In our judgment the contention is untenable. The language of clause (vi) of section 123 is express and explicit and that apart from the consideration that any clause which lays down any corrupt practice must be strictly construed. The clause does not say that anything which is in contravention of section 77 is a corrupt practice. But what it says is that the incurring or authorising of expenditure in contravention of that section is a corrupt practice. Incidentally we may observe that there is a provision in the Representation of the People Act, 1951, which deals with " disqualifications for membership of Parliament or of a State Legislature " and clause (*c*) of that section relates to failure on the part of a person who has failed to lodge an account of his election expenses within the time and in the manner required under the Act. The carrying out of that requirement or failure to do so is a matter not for the Election Tribunal but for the Election Commission. It is that body which is concerned with this aspect of the matter. We do not deem it necessary in view of the plain and unambiguous language of clause (vi) of section 123 to discuss the matter in any detail. The present contention of the appellant must be negatived."

Two decisions of the Orissa High Court may now be briefly noticed though neither of them can be said to be a direct decision on the point.

In *Pyari Mohan* v. *Durga Sankar*[2], it was *inter alia* alleged by the election petitioner that the election expenses account filed by the returned candidate did not show the expenditure incurred day by day by some of his workers. Narasimham, C.J., dealing with this charge said :—

" Even if this argument is taken as correct I do not think a slight irregularity in the maintenance of accounts as required by rule 131 would be a corrupt practice for the purpose of sub-section (6) of section 123 of the Act. Doubtless, if any amount actually expended is not brought into the accounts it would clearly constitute corrupt practice in as much as the total amount of expenditure prescribed may be exceeded and thereby sub-section (3) of section 77 contravened. But every petty irregularity in the manner of maintenance of accounts so long as the correctness of the entries is not in doubt, will not suffice to bring sub-section (6) of section 123 of the Act into operation ".

The above observations were clearly *obiter dicta*. There was no allegation in the case before the learned Chief Justice that any item of expenditure incurred by the candidate had not been incorporated into the account. Further it is not clear whether the omission to bring into the account a sum actually expended which even if added to the total expenditure would not result in the prescribed limit of expenditure being exceeded would in the opinion of the learned Chief Justice, constitute a corrupt practice. We are rather inclined to think that what the learned Chief Justice meant was that any omission or failure to include in the account a particular sum actually expended would amount to a corrupt practice only if the total amount of expenditure would be exceeded by the inclusion of that amount. Then the contravention would really be of sub-section (3) of section 77 of the Act.

In *Akshya Narayan* v. *Maheswar Bag*[3], there was no evidence to show that any item of expenditure incurred by the candidate's workers was not eventually brought

1. A.I.R. 1958 All. 663.
2. A.I.R. 1958 Orissa 125.
3. A.I.R. 1958 Orissa 207.

into the accounts but it was found that such expenditure was not noted from day to day. On these facts Narasimham, C.J., held that no corrupt practice had been committed, as a fact. Incidentally, however, he stated :—

"Doubtless if any item of expenditure was omitted altogether in the accounts that would be serious matter and may amount to a corrupt practice in as much as there is a likelihood of the total expenditure for the election exceeding the amount prescribed. But so long as every item of expenditure is accounted for I do not think that the mere omission to mention the dates on which each item of expenditure was actually incurred on behalf of the candidate by his workers, is such a serious irregularity as to amount to a corrupt practice."

Here again it is not clear that the learned Chief Justice meant to lay down that if any item of expenditure is omitted such omission would itself amount to a corrupt practice. To give a concrete instance, suppose the maximum amount prescribed is Rs. 5,000 and the amount submitted by the candidate shows an expenditure of Rs. 4,000 odd and it is discovered during the hearing of the election petition that a sum of Rs. 20 which had been expended by the candidate had not been included. Obviously the inclusion of this amount of Rs. 20 would not result in the exceeding of the prescribed limit. In such a case we are not certain that in the view of the learned Chief Justice even such an omission would amount to a corrupt practice even though there is no likelihood of the total expenditure exceeding the prescribed amount. In our opinion there is nothing in either of the judgments of the Orissa High Court which militates against the view we have taken and which has also been taken by the High Courts whose decisions we have referred to above.

On this construction of section 123 (6) and section 77 of the Act we hold that even assuming that the appellant had omitted to include the expenditure incurred by him for the wall paintings and for the telegram he would not be guilty of any corrupt practice under section 123 (6). There can be no doubt whatever that the addtition of the said items of expenditure would not result in the maximum limit of expenditure being exceeded. As the election of the appellant has been set aside solely on the ground that he was guilty of a corrupt practice under section 123 (6) of the Act and as we have held that he was not so guilty this appeal is allowed and the order of the Election Tribunal setting aside the appellant's election is hereby set aside and the election petition filed by the respondent is dismissed with costs before the Election Tribunal. No order as to costs here.

V.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE BALAKRISHNA AYYAR.

D. Namasivaya Mudaliar and others .. *Petitioners**

v.

State of Madras by Revenue Divisional Officer, Tirukoilur and others .. *Respondents.*

Madras Lignite (Acquisition of Land) Act (XI of 1953)—Validity—Compensation for land acquired under—Restriction on the quantum—Validity.

Constitution of India (1950), Article 31—'Compensation'—Scope and meaning of—If altered by the Constitution Fourth Amendment Act of 1955.

The effect of the Madras Lignite (Acquisition of Land) Act, 1953, which purports to amend the relevant provisions of the Land Acquisition Act, is that no compensation shall be provided for improvements made after a specified date unless they are agricultural improvements. These are not principles on the basis of which compensation can be computed as required by Article 31 (2) of the Constitution. They are more in the nature of devices to refuse compensation and such provisions in the Act offend against clause (2) of Article 31 of the Constitution and is therefore unconstitutional.

It is no doubt true that the effect of the amendment made in 1955 to the Constitution of India precludes the Courts from going into the adequacy of the compensation provided. But that does

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* W.Ps. Nos. 1, 2, 202, 203, 204, 309 and 373 of 1958. 2nd February, 1959. (13th Maga 1880—Saka).

not mean that the Courts are precluded from considering whether what is called compensation is really so and whether what are claimed to be principles on the basis of which compensation is to be computed are really so within the meaning of Article 31 (2) of the Constitution.

The word 'compensation' means the just equivalent of the property taken. Though there might be reasonable scope for honest difference of opinion as regards valuation of property, in every case of valuation there is a stage beyond which scope for difference of opinion ceases. It may be that by the 1955 Amendment of the Constitution the Legislature has been given the fullest measure of discretion in dealing with and providing for the diverse factors that enter into the computation of the value of compensation. The Legislature may, instead of fixing the quantum of compensation itself, provide in any Act the principles in accordance with which the compensation is to be ascertained. But the principles should be rational rules appropriate to the subject-matter and not devices to evade the ascertainment of the just compensation. Such principles should also relate reasonably to the time of the acquisition and should cover the whole property that is being acquired and not merely a portion of it..

Where a legislation provides, as does the Madras Act XI of 1953, that compensation after a particular date shall be paid only in respect of certain improvements done and not others and fixes the quantum of compensation without any basis or principle, without taking into account valuable accretions to the property, and which fixes dates for the purpose of ascertaining the compensation which are not approriate to the matter it would come perilously close to a fraudulent exercise of power.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *mandamus* directing the Repondents to refrain from taking possession of the lands and building from the petitioner in S. No. 258/1B and 180/4C in Gangaikondan Village, South Arcot, without adequate compensation.

G. R. Jagadisan and *T. V. Balakrishnan*, for Petitioner in W.P. Nos. 1, 2, 309 and 373 of 1958.

S. Mohan Kumaramangalam, *K. V. Sankaran* and *N. Vanchinathan*, for Petitioner in W.P. Nos. 202, 203 and 204 of 1958.

The Advocate-General (*V. K. Tiruvenkatachari*) and the Additional Government Pleader (*K. Veeraswami*) for Respondents.

The Order of the Court was made by

Balakrishna Ayyar, J.—The question for determination in all these writ petitions are the same and so we shall deal with them together.

The relevant facts are these. Investigations carried out by the Geological Survey of India revealed that large deposits of brown coal or lignite lay in and around Cuddalore and Vriddhachalam Taluks in South Arcot District. The Government decided to mine this coal and for that purpose it was necessary for them to get control over the lignite-bearing areas. Meantime speculators attempted to buy up lands in the area at low prices in the expectation that prices would rise by the time Government decided to acquire the lands; they hoped that they would be able to sell the lands to the Government at a large profit. On 6th October, 1948, Government issued a Press Note which said *inter alia*:

"To prevent such speculative dealings, the Government propose to undertake legislation reserving to themselves the power to compel any person who has purchased land on or after a date (to be prescribed) in 1947 in the lignite-bearing areas to sell such land to them at the rate at which it was purchased. The Government therefore advise the owners of the lignite-bearing lands in the Vriddhachalam and Cuddalore taluks not to dispose of their lands to speculators".

One comment on this document may at once be made. It did not prohibit the construction of any buildings on any of the lands comprised in the lignite area; it did not warn that legislation would be undertaken to prevent such building and finally it did not warn that no compensation would be paid for any buildings that might be erected. Whether at that stage the Government had the power by order or notification to prevent the construction of any building we need not stop to consider. It will be sufficient to mention that as a matter of fact no prohibition or warning was issued against the construction of any buildings.

On 7th January, 1953, Government published the statement of objects and reasons relating to a Bill which subsequently became Madras Act XI of 1953. Paragraph 2 of that statement runs as follows:

"It is apprehended that the prospect of acquisition of vast areas of private lands in connection with the lignite operations will give rise to speculative dealings in lands in these areas. The quarrying operations at Neiveli will also lead many people to think of buying lands with a view to selling them later to Government at higher prices. The Government have already warned the public against such speculative dealings by a Press Note, dated the 6th October, 1948. In the circumstances the Government consider it necessary to promote legislation to prevent speculative dealings in the lignite-bearing lands by taking power for the Government to acquire these lands at the price that prevailed on the 28th April, 1947, when the first mining operations were started in the area, providing at the same time for the payment of the value of any agricultural improvements effected on the lands after that date up to the date of notice of acquisition. The acquisition will be made in accordance with the provisions of the Land Acquisition Act, 1894 (Central Act I of 1894) subject to the modification specified above in regard to the valuation of the lands and to the further modification that the urgency provisions of that Act will be applied for the acquisition of all lands required for this scheme. The Bill is designed to achieve this object ".

This was the first warning that payment would not be made for buildings or improvements other than agricultural improvements. The Bill was duly passed by the State Legislature, and, on 2nd June, 1953, it received the assent of the President. On 10th June, 1953, the Act was published and it came into force on 20th August, 1953.

So far as is here relevant Madras Act XI of 1953 amended the Land Acquisition Act in two important respects. Section 11 of the Land Acquisition Act directs the Collector to ascertain the value of the land at the date of the publication of the notification under section 4 (1) that is to say, the date on which the Government notified that they considered that the land was needed or likely to be needed for a public purpose. Madras Act XI of 1953 substituted the date, 28th April, 1947, for the date of the notification under section 4 (1) of the Land Acquisition Act. That was one change. The other change was this. It directed that compensation was payable only for agricultural improvements on the land commenced or made after 28th April, 1947, and before, the date of the publication of the notification under section 4 (1) of the Land Acquisition Act. It was only for this class of improvements that compensation was to be paid by the Collector. Compensation was denied for every other kind of improvement regardless of their value and regardless of whether they had been lawfully made or not.

Gangaikondan village in Vriddhachalam Taluk is included in the schedule of villages appended to Madras Act XI of 1953. On various dates between January, 1957 and May, 1957, Government issued notifications under section 4 (1) of the Land Acquisition Act in respect of the lands belonging to the petitioners, or, in which they claimed some interest or other. Subsequently and during the same period Government issued declarations under section 6 of the Land Acquisition Act that the lands were needed for a public purpose. Thereafter and on various dates between May, 1957 and November, 1957, the Land Acquisition Officer passed his awards under section 11 of the Land Acquisition Act.

In Writ Petition No. 1 of 1958 two fields are involved, *viz.*, S. No. 180/4C and 258/1B. For the former field the Land Acquisition Officer awarded a compensation of Rs. 138 and for the latter a compensation of Rs. 938, but he refused to award any compensation in respect of the buildings standing on the lands. In the affidavit which he filed in Writ Petition No. 1 of 1958 the petitioner alleged that after purchasing the land he had raised its level at a cost of about Rs. 2,000 and that thereafter he had put up a hotel at a cost of Rs. 8,000 and also a building in which a rice-mill is located, at a cost of Rs. 16,000.

The petitioner in Writ Petition No. 2 of 1958 alleged that he had put up constructions of the value of about Rs. 32,000.

The affidavit in Writ Petition No. 202 of 1958 was filed by a friend of the petitioner and therein he stated that the petitioner was a lessee of the land from one Gopalaswami Naidu, and, that in or about 1952 the petitioner had constructed two buildings on the land at a cost of about Rs. 1,000. He is running a tea-stall in one of these and living in the other.

In Writ Petition No. 203 of 1958 the husband of the petitioner filed an affidavit stating that four houses costing Rs. 1,500 had been put up on the land.

In Writ Petition No. 204 of 1958, the son of the petitioner filed an affidavit alleging that four buildings had been constructed at a total cost of Rs. 1,500. He also stated that all the four buildings had been in existence from 1946.

The petitioner in Writ Petition No. 309 of 1958 alleged that the market price of the buildings standing on the land would be more than Rs. 30,000. In addition to buildings he had also put up two granaries at a cost of Rs. 1,000 and a cattle-shed at a cost of Rs. 500.

The petitioner in Writ Petition No. 373 of 1958 claimed that he had put up buildings as early as 1940 and that from time to time he had effected improvements and repairs and that the market price of the buildings would be more than Rs. 3,500.

During the arguments, we were given a tabular statement from which it is clear that the existence of the buildings is not denied. It would, however, appear from that statement that the value put on the buildings in the various affidavits filed is greatly exaggerated.

The first contention urged on behalf of the petitioners may be briefly disposed of. Mr. G. R. Jagadisan argued: We shall assume for the moment that Madras Act XI of 1953 is valid and in accordance with the Constitution. It directs the Collector to enquire into the value of the land as on 28th April, 1947. This date applies only to the *value* of the land and not to the *condition* of the land on that date so that if even after that date improvements have been made on the land, they must be paid for. In answer to this argument it is sufficient to say that the words used in the Act will not bear the distinction between the value of the land and the condition of the land on which Mr. Jagadisan laid emphasis. "Land" is defined in section 3 (*a*) of the Land Acquisition Act in these terms.

"The expression 'land' includes benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth".

The expression "value of the land on the 28th April, 1947" occurring in Madras Act XI of 1953 would, therefore, apply only to the *land* as it stood on that date. It would apply both to the condition of the land and the value of the land. Whatever scope for argument may have otherwise existed, is shut out by the specific provision that enquiry shall be made into the value of any agricultural improvements made on the land between 28th April, 1947 and the date of the notification under section 4 (1) of the Land Acquisition Act. By necessary implication this means that the Act directs that no compensation should be paid for any other form of improvement.

The next objection urged on behalf of the petitioners is more substantial, and it brings us to the real question raised in these petitions, *viz.*, whether the provision made in Madras Act XI of 1953 that compensation for the land need be paid only on the basis of its value on 28th April, 1947 and that no compensation need be paid for improvements other than agricultural improvements made thereafter is repugnant to the Constitution or not.

The argument of Mr. Jagadisan on this part of the case may be thus summarised. Article 31 (2) of the Constitution requires that any law providing for the acquisition of any property should either itself fix the compensation for the property or lay down the principles in accordance with which the compensation can be computed. When in effect Madras Act XI of 1953 directs that the value of the buildings and other non-agricultural improvements which the petitioners have made on their property shall not be taken into account in assessing the compensation, what the Act really says is that those buildings and improvements shall be taken over by the Government without payment of any compensation at all. The Act, therefore, contravenes Article 31 (2) and is therefore bad.

There is no fairness in this either. When the Government published their Press Note, they issued no warning against the construction of any building or the making of improvements. All the warning that they gave was against speculative dealings in property.

Not merely that. Madras Act XI of 1953 directs that compensation shall be paid on the basis of the value of the land as on 28th April, 1947. This is a date which has no bearing on the value of the land at the time it was acquired. It is a wholly irrelevant circumstance. Since that date the value of the land, leaving out all speculative elements, may have gone up owing to quite legitimate causes. To deprive a person of the value that has accrued to his property owing to natural and lawful causes is also unconstitutional.

Mr. Jagadisan next referred to various passages in Rottschaefer on Constitutional Law, 1939 edition. On page 718, the learned author says :

"The measure of just compensation is the fair value of the property taken as of the time of its taking. The compensation must be paid in money unless the owner of the property is willing to accept payment in some other form".

From this it is clear that compensation must be the fair value of the property and that value must be ascertained as at the time of the taking. And, on page 719, it is stated :

"It is beyond the purview of this text to discuss in detail the numerous matters involved in determing the fair value of the property taken. The Constitution does not require payment of purely speculative values, nor values based on the adaptability of the property for the uses for which it is being taken unless these are reflected in the market price that would be offered in a private sale. It is necessary to consider only those factors affecting value which are reflected in the market value of the property at the time it is taken. In estimating such value consideration may not be given to the fact that the property could be acquired by eminent domain. If the property taken consists of land, the value of growing crops thereon must be taken into account in estimating its value. The fact that the property consists of timber or mineral lands must be considered so far as their presence has affected the market value, but the timber and minerals need not be separately valued. It is the general rule that injury to a business carried on upon lands taken for public use does not constitute an element in just compensation. The foreging general principles define the minimum constitutional requirements, but there is nothing in either the Federal or State Constitutions prohibiting compensation in excess thereof".

It will be noticed, that the word used in Article 31 (2) of the Constitution is "compensation" and not "just compensation". But the omission of the adjective "just" does not alter the meaning of the word "compensation", and, as we shall presently explain, the absence of the adjective does not permit the State Legislature to fix arbitrary amounts as compensation, or, lay down arbitrary or irrelevant rules in accordance with which the computation is to be determined.

Mr. Jagadisan also referred to *The State of West Bengal* v. *Bela Banerjee and others*[1]. The Legislature of West Bengal had passed an Act, XXI of 1948, directing that in respect of lands acquired for the settlement of Immigrants from East Bengal the compensation payable should not exceed the market value of the land on December 31, 1946. The High Court of Calcutta held that this provision was void. The Supreme Court confirmed that view. Patanjali Sastri, C.J., ruled:

"It is argued that the term 'compensation' in Entry 42 could not mean full cash equivalent, for then, the power conferred on the legislature to lay down the principles on which compensation is to be determined and the form and the manner in which such compensation is to be given would be rendered nugatory. On the other hand, the entry showed that compensation to be 'given' was only 'such compensation' as was determined on the principles laid down by the law enacted in the exercise of the power, and, as the concluding words used in Article 31 (2) are substantially the same as in the entry, the Constitution, it was claimed, left scope for legislative discretion in determining the measure of the indemnity.

We are unable to agree with this view. While it is true that the legislature is given the discretionary power of laying down the principles which should govern the determination of the amount to be given to the owner for the property appropriated, such principles must ensure that what is determined as payable *must be compensation, that is, a just equivalent of what the owner has been deprived of.* Within the limits of this basic requirement of *full indemnification of the expropriated owner* the Constitution allows free play to the legislative judgment as to what principles should guide the determination of the amount payable. Whether such principles take into account all the elements which make up the true value of the property appropriated and excluded matters which are to be neglected, is a justiciable issue to be adjudicated by the Court. This, indeed, was not disputed".

It will be noticed that in one respect the Bengal Act did not go even so far as Madras Act XI of 1953. The Bengal Act did not deny the citizen compensation

1. (1954) 1 M.L.J. 162 (S. C.): (1954) S.C.J. 95 : 1954 S.C.R. 558.

for the value of the improvements that he had effected after 31st December, 1946, whereas the Madras Act denies compensation for all non-agricultural improvements made after 28th April, 1947. The relevant provision of the Bengal Act directed that the value was to be computed

" on the assumption that the land had been at the date in the state in which it in fact was on the date of publication of the said notification ".

Nevertheless, that provision was held invalid. In 1948, an Act called the Re-settlement of Displaced Persons (Land Acquisition) Act was passed by the Punjab Legislature. It provided that the market value of the property

" shall be deemed to be the market value of such land on the date of publication of the notice under section 3 or on the 1st day of September, 1939, with an addition of 40 per cent. whichever is less ".

The validity of this Act was questioned and the Punjab High Court in *Than Singh* v. *Union of India*[1], had no difficulty in holding that the fixation of an arbitrary date was repugnant to the Constitution. The Court observed :

"There can be no doubt that the arbitrary fixing of the dates in the provisos will inevitably result in the payment of less than just compensation to the owners. There appears to be no justification why the compensation should not equal the market-value of the land on the date on which the notification under section 3 is issued."

The learned Judge then referred to the decision of the Supreme Court, which we have already cited and ended:

" These observations apply to the provisos to section 7 (1) (*e*) of Act LX of 1948 with equal force and applying the principle laid down by their Lordships I must hold that provisos to section 7 (1) (*e*) are *ultra vires* the Constitution ".

In 1948 the Legislature of the United Provinces passed an Act for the acquisition of land for the rehabilitation of refugees from Pakistan. That Act provided that

" the market value referred to in clause first of the said sub-section shall be deemed to be the market value of such land on the date of publication of the notice under section 7 or 9, as the case may be, or on the first day of September, 1939, whichever is less ".

The validity of this Act was questioned in *H. P. Kandewal* v. *State of Uttar Pradesh*[2] and the Allahabad High Court observed :

" The properties in dispute of five of the petitioners were acquired by them after 1st April, 1948 and therefore the compensation payable to them under the Act is limited to the market value of the property on 1st September, 1939. It needs, we think, no argument to show that such payment is not compensation within the meaning of Article 31 (2) or section 299 (2)."

In 1951, the Legislature of Bihar passed an Act called the Kosi Area (Restoration of Lands to Raiyats) Act, 1951. The purpose of the Act was to provide for the restoration to former ryots of lands which had been sold for arrears of rent or from which they had been ejected for arrears of rent or which were treated as having been abandoned by them, between 1939 and 1950. That Act empowered the Collector to acquire the lands. The compensation payable was to be ascertained with reference to the amount mentioned in the sale proclamation for the realisation of which the holding or part there of was sold, or the amount of the arrears of rent and interest thereon for non-payment of which ejectment was ordered and other similar matters. In addition the Collector was directed to ascertain the cost of improvements, if any had been effected on the holding after the concerned ryot had lost possession. On the question whether these provisions were in conformity with the Constitution, in *Chhaya Devi* v. *State of Bihar*[3], the Patna High Court ruled:

" The argument presented on behalf of the petitioners is that the statute contravenes the constitutional guarantee under Article 31 (2). It was submitted by Mr. B. C. Ghosh that the fixing of compensation under section 7 (2) is arbitrary and cannot be regarded as due compliance with the requirements of Article 31 (2). It was contended that the Act was a permanent enactment and lands may be acquired under it many years after it had come into force. It was argued that compensation was fixed under section 7 (2) of the Act with reference to the date of sale of the holding in execution of the rent decree or with reference to the date of settlement of the holding by the landlord with the third party.

1. A.I.R. 1955 Punj. 55.
2. A.I.R. 1955 All. 12.
3. A.I.R. 1957 Patna 44.

It was submitted that the compensation should be fixed with reference to the value of the land at the time of the restoration to the raiyat in pursuance of the order passed by the Collector under sections 3 and 7 of the Act. The argument advanced on behalf of the petitioners was based upon the decision of the Supreme Court in the *State of West Bengal* v. *Bala Banerjee*[1]. In my view the argument presented by the learned counsel for the petitioners is well founded. The present case is directly covered by the decision of the Supreme Court in *State of West Bengal* v. *Bala Banerjee*[1], and it must be held that the provisions of Article 31 (2) of the Constitution have been violated ".

On behalf of the Government it was argued in that case that the Act was saved by the amendments made to the Constitution in 1955. But that contention was also overruled.

This decision was followed by the Patna High Court in the following year in the case reported in *Julius Oraon* v. *Mt. Saniaro*[2].

In these circumstances Mr. Jagadisan contended that the provision made in Madras Act XI of 1953 for the payment of compensation is bad and unconstitutional.

The learned Advocate-General argued that the fact had been widely published and that everybody concerned in the locality knew that Government intended to acquire these lands, that after such acquisition the lands would be dug up and that if knowing that anybody constructed buildings he cannot complain if he is not paid the value of those buildings. No doubt most people in the locality did probably know that their lands were liable to be acquired, but nobody could have said when any particular plot of land would actually be acquired. It may be acquired at once, or, it may not be acquired for several years, and, in fact, a particular plot of land may not be acquired at all. Merely because at some future time Government may want to acquire a piece of land they have no right to insist that the owner thereof should not deal with it as the law permits him to do. If the view put forward on behalf of the Government on this part of the case were right, a ryot who has got only a thatched roof over his house would be precluded from tiling it. He would be also precluded from converting his mud-hut into a brick one. If his family increased it would not be permissible to him to add an extra room or two. If he did any such thing and subsequently Government decided that the land was necessary for the purpose of their projects, they would be entitled to take over the property without paying compensation for the improvements that had been properly and lawfully effected. All legal considerations apart, it is difficult to see any fairness in a rule that produces such a result.

It will be appreciated that from a strictly legal point of view, this aspect of the matter on which the learned Advocate-General placed some emphasis is hardly relevant. At the time the various individuals concerned put up their buildings, there was no legal prohibition against their doing so. The persons concerned were entitled to put up those buildings. Those buildings became part of their property and they can properly insist that when such properties are taken away from them the requirements of the Constitution should be complied with. After all they had done nothing that entails the penalty of forfeiture.

The learned Advocate-General next said that Government have made elaborate provisions for resettling the villagers whose lands and homesteads might be acquired, that various concessions have been provided for them in that regard, and that the persons who have put up buildings, or several of them, are outsiders who wanted to make quick profits out of boom conditions.

This argument too leads nowhere. It may be as the learned Advocate General explained that Government have made very commendable provisions to house the persons who might be displaced by the implementation of their mining schemes. But, this is not an answer whatever to the claim of the petitioners. They are entitled to say : it may be all right as regards the rest, but, what about our lawful rights ? It is no consolation to Peter to know that the money taken from him would benefit Paul. The petitioners may be outsiders to the locality, but, they are not enemy aliens. They are citizens of the Indian Union and entitled to the protection of the Constitu-

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1. (1954) 1 M.L.J. 162 (S.C.) : (1954) S.C.J. 95 : 1954 S.C.R. 558.
2. A.I.R. 1958 Pat. 519.

tion. If they attempted to utilise the prevailing conditions to earn a living or to make profits for themselves they set about the work in a manner authorised by the law. Their enterprise in every case was lawful. Lawful enterprise is not banned by the Constitution.

The learned Advocate-General next said that Madras Act XI of 1953 had been reserved for the consideration of the President and had received his assent under Article 31 (3) of the Constitution. But, from this it does not follow that Courts are precluded from considering whether the Act offends against any of the provisions of the Constitution. At the time the Constitution was framed apprehensions were possibly entertained about the manner in which some legislatures might be tempted to use their power in relation to the acquisition of property, and, the provision requiring that the Bill relating to the acquisition of property for a public purpose should be reserved for the consideration of the President and that it shall not take effect until it had received his assent, appears to be intended as a preliminary safeguard against hasty or ill-considered legislative activity. Nowhere in the Constitution is it stated that the assent of the President shall be conclusive proof that the requirements of the Constitution have been complied with. The position here is this. Unless the President gives his assent no part of the law can take effect at all. But a subsequent scrutiny before the Courts to determine whether any particular provision or set of provisions offends against any particular Article of the Constitution is not barred. It may be pointed out here that clause (4) of Article 31 contains a provision to the effect that the laws

> " so assented to shall not be called in question in any Court on the ground that it contravenes the provisions of clause (2)".

But, there is no such provision in clause (3) of Article 31.

The learned Advocate-General next said that there is no evidence to show that the price of land in April, 1947, was materially lower than the price prevailing in 1957 and that before the Land Acquisition Officer no objection was taken to the properties being valued as on 28th April, 1947.

Now, the writ jurisdiction of this Court is circumscribed in various ways and is subject to various limitations. One of these is that when exercising such jurisdiction it cannot investigate disputed issues of fact. Whether the price of immoveable property in Gangaikondan village in 1947 was materially lower than the price in 1957 is a question of fact, and, not a matter which we can investigate here. But the point remains that the date fixed in Madras Act XI of 1953 has no relevancy whatever to the value of the property at the time of its acquisition. It may have been entirely different if the direction given in the Act had been to ignore transactions which were purely speculative in character. But, this is not what the Act directs. It directs that the price shall be fixed with reference to a date which is entirely irrelevant.

Commenting on the decision in the *State of West Bengal* v. *Bela Banerjee and others*[1] the learned Advocate-General pointed out that it was given before the Constitution was amended in 1955 and therefore that decision and the others that followed it are not at present wholly applicable. But, this is not entirely so. They are inapplicable to the extent that they decided that the question of the adequacy of the compensation is justiciable, but they do not cease to be applicable in other respects. In particular the view expressed by the Supreme Court as to what constitutes compensation—we have already extracted the relevant passage above—still very fully and firmly occupies the field. The rule laid down in the decisions that it is not competent to the Legislature to direct that the value of property acquired for a public purpose shall be ascertained with reference to an anterior and irrelevant date stays and continues to be good law.

There was a certain amount of argument whether the amendment made to the Constitution in 1955 is retrospective in its operation or not. We do not think it necessary to go into this matter because the effect of the amendment made in 1955 is to

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1. (1954) 1 M.L.J. 162 (S.C.) : (1954) S.C.J. 95 : 1954 S.C.R. 558.

preclude the Courts from going into the adequacy of the compensation provided. But, that amendment does not preclude the Courts from considering whether what is called compensation is really compensation and whether what are claimed to be principles on the basis of which the compensation is to be computed are really principles of the kind envisaged in Article 31 (2) of the Constitution.

The learned Advocate-General next argued that it is open to the Legislature to append to its Act a schedule specifying the particular amounts of money payable in respect of a particular piece of land and that the Courts would be precluded from questioning its adequacy. Now, if the legislature can do that, he continued, it can lay down principles by which the same result can be produced. He also mantained that it would be permissible to the legislature when making provision for the acquisition of land to direct that compensation need be paid only, say, in respect of two cents of land even though a very much larger extent might be acquired and, that the Courts are precluded from going behind these matters.

It will be realised that if this position for which the learned Advocate-General contended is accepted, a very important safeguard incorporated in the Constitution in respect of property would plainly and definitely cease to exist. It is not to be supposed that in so important a document as the Constitution of the country its framers intended to write empty words. Wise in their way, they considered it necessary to provide certain safeguards for private property and to prevent such property being arbitrarily taken away under the guise of legislative or executive power. One such safeguard was incorporated in clause (2) of Article 31 of the Constitution. As it originally stood the clause required that any law providing for the acquisition or taking over of private property for a public purpose should either fix the amount of the compensation or specify the principles on the basis of which the compensation could be computed. The words used in the Article are compensation and principles, and, to these two words we shall have to refer again.

The question whether the compensation was adequate or not, and, whether the principles were just and reasonable or not, remained justiciable till the amendment made to the Constitution in 1955 added the following words to clause (2) of Article 31

" and no such law shall be called in question in any Court on the ground that the compensation provided by that law is not adequate ".

The effect of the amendment was to substitute the discretion of the legislature for the discretion of the Courts in deciding the question whether the compensation provided for was adequate or not. Whereas prior to the amendment Courts could rule that the compensation provided in the Act was inadequate they could not do so thereafter. The citizen has to be content to accept the compensation provided by the Legislature in the relevant statute. Be it noted, however, that it is compensation which the statute has to make provision for.

The amendment made to the Constitution in 1955 did not change this clause in the Article in any other way. The original requirements (1) that compensation should be paid for the property, and (2) that the Statute should specify the amount of the compensation or the principles in accordance with which the compensation could be ascertained, were not taken away. They still remain in the Constitution in the same sense in which they stood before 1955.

The Shorter Oxford English Dictionary explains that the word "compensation" is formed by combining *com* and *pensare*, or *pendere* meaning weight. Compensation therefore means to counterbalance, to be an equivalent, to make equal return to, etc. The fact will bear repetition that when the Constitution was amended in 1955 the idea of an equivalent which is implied in the word "compensation" was not given up or abandoned. The amendment did not delete the word "compensation" and substitute any other word like "price" or "consideration" or "solatium" in its place. The amendment did not do away with the idea of an equal return. Only it was provided that it was for the Legislature to determine what the exact equivalent should be.

As we have mentioned earlier in *The State of West Bengal* v. *Bela Banerjee and others*[1] the Supreme Court stated in unmistakable terms that the principles referred to in clause (2) of Article 31

> " must ensure that what is determined as payable must be compensation, that is, a just equivalent of what the owner has been deprived of ".

When after this authoritative pronouncement had been made the Constitution was amended and still the word "compensation" was retained and not replaced by another word, the conclusion cannot be resisted that the Constitution continues to retain its insistence that a citizen should be paid a just equivalent of the property which is taken away from him. In relation to any property "compensation" therefore means the exact equivalent of that property, in money or other form of property.

On the question what is the exact equivalent, reasonable men may honestly differ and the field of difference may indeed be very wide. For example, one expert may value an article or an item of immoveable property at say Rs. 5,000 ; a second may put it at Rs. 7,000 and a third may put it at Rs. 4,000. But, a stage is reached beyond which the scope for honest difference of opinion or estimate ceases to exist ; and when what is offered for the property taken away is less than this, it will no longer be possible to say that what is offered is compensation in any sense of the word. If, for example, Government were to decide to acquire a row of buildings on Mount Road or Esplanade and offer a payment of Rs. 100 for "Dare House" or the Mysore Bank building nobody would call that compensation ; and this fact will not be altered by the figure of Rs. 100 being inserted in the schedule to an Act passed by the State Legislature. But, this is exactly what the contentions on behalf of the Government now come to.

Before any payment can be properly described as compensation, the amount preferred must be such that a fair and reasonably minded person, uninfluenced by extraneous considerations, can honestly say—subject of course to legitimate allowance or latitude for difference of opinion—that it is a fair equivalent. We would repeat again that this requirement about a fair equivalent has not been abrogated by the amendment made to the Constitution in 1955.

Various elements, some of them quite imponderable, often enter into the computation of the value of any given property. Difference of opinion may also arise on the question whether certain elements should or should not be taken into account in computing compensation. Some of these matters are referred to in Rottschaefer on Constitutional Law. See for instance the observations on page 720.

> " It is a practically universal rule that when part of a given tract of land is taken just compensation includes not only the value of the part taken but also damages to the remainder. It does not, however, include damages thereto resulting from the use of the adjoining lands of others taken for the same undertaking as that for which his were acquired. It frequently happens that the appropriation of a part results in benefits to the remainder because of the uses made of the part that is taken. The question whether, and to what extent, these benefits may be considered in determining just compensation has been much considered. Their consideration can only reduce what would otherwise constitute just compensation. A rule that made no adjustment for them would raise no constitutional issue. This could arise only so far as benefits were permitted to some extent to offset what would otherwise be just compensation. There exists a great diversity of opinion on this point. It is held in some States that special benefits to the retained property may be set off against damages to the latter, but not against the value of the land actually taken; in others that both special and general benefits may be set off to that extent ; in others that special benefits may be set off against both damages to the part retained and the value of that taken ; and in others that both special and general benefits may be set off to that extent ".

As a result of the amendment made in 1955 the legislature received the fullest measure of discretion in dealing with and providing for the diverse factors that enter into the computation of the price of property. But, having said all this, and, after making every permissible allowance for genuine differences of opinion, it must still be possible to say that what the Act provides is compensation, and, when as we have

1. (1954) 1 M.L.J. 162 (S.C.): (1954) S.C.J. 95 : 1954 S.C.R. 558.

already explained, the stage is reached when it becomes honestly impossible to say that, the conclusion must follow that the Act does not provide for payment of compensation and therefore does not conform to the requirements of clause (2) of Article 31.

Instead of itself fixing the quantum of compensation for the property to be acquired it is competent to the legislature to specify the principles in accordance with which the compensation is to be ascertained. But, then, they must be *principles*, that is to say, rational rules appropriate to the subject-matter and not devices or formulae compounded of irrelevant considerations. Besides, these principles must be truly designed to ascertain the proper amount of compensation. They must not be framed with other or ulterior objectives. If we spend some time turning the matter over in our minds it will become apparent that quite a few ideas are packed into the words, 'the principles on which compensation has to be determined'. Various matters are here implicit. First, the principles must be appropriate to the nature of the property to which they are applied. If, for example, the statute were to say that a luxury liner which has just been launched is to be valued as if it were so many tons of firewood, no one will have any difficulty in saying that it is not a principle at all. Again if the statute were to say that diamonds and sapphires are to be valued as if they constituted so many oysters, the same comment, that it is not a principle of valuation would be unanimously assented to. These are no doubt extreme illustrations, but, they will bring out the full force of the criticism that lands on which buildings stand cannot be valued as if they were solely agricultural lands.

The next idea that is implicit in the words 'principles in accordance with which compensation is to be determined' is that they must be applicable to the time at which the property is being acquired. If for any particular reason it is considered expedient to fix a date, that date must be reasonably proximate to the date of acquisition and must not be fixed with a view to avoid payment for rights or interests that a citizen may have lawfully acquired in the property which is being taken away for public use. At this stage too we may perhaps give an extreme illustration. If for example the State Legislature were to pass an Act enabling the acquisition of a property in George Town and were to direct that the price of the property shall be computed as on the date when the Raja of Chandragiri made a grant to the East India Company of the site on which Fort St. George now stands, that would not be a *principle* by which the compensation can be determined : it would be only a device for confiscation.

Finally, the principles relating to the computation of compensation must deal with or cover the whole property that is being acquired and not merely a portion of it. If for example the property that is being acquired is a tea or coffee-garden, or a plantation consisting of teak or other valuable hard-wood trees, the principles, if any, laid down in the Act must include provision for compensation in respect of the tea or coffee bushes and the timber—though they need not be separately valued. To refuse to pay for them and to provide for payment for only the bare land would be like paying only for a pack-animal and insisting on the delivery of the silks, spices, bullion and jewellery that may have been loaded on the animal's back. Legislation which in fixing the principles of compensation refuses to take into account valuable accretions to the property, or, which fixes dates which are not appropriate to the matter would come perilously close to a fraudulent exercise of power. The legislature of course must be vigilant against waste of public funds ; but, at the same time, it has no power to confiscate.

In effect, what Madras Act XI of 1953 says is this. No compensation shall be provided for improvements made after 28th April, 1947, unless they are agricultural improvements. The value of the property shall be determined as on 28th April, 1947. As we explained, it is impossible to regard these injunctions as principles on the basis of which compensation can be computed. They are more in the nature of devices to refuse compensation. This provision in the Act offends against clause (2) of Article 31 of the Constitution, and, it is therefore unconstitutional.

The awards passed on the basis of this provision in the Act cannot therefore be sustained and they are quashed so far as the petitioners are concerned. It will be open to the Land Acquisition Officer to pass revised awards in conformity with the requirements of Act I of 1894 and without regard to these amendments made in that Act by Madras Act XI of 1953 which we have held to be bad.

There will be no order as regards costs.

R.M. ——— *Awards set aside: Directions issued.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GANAPATIA PILLAI.

Ganapathia Pillai .. *Petitioner**

v.

Ekambara Mooppan and another .. *Respondents.*

Madras Indebted Agriculturist (Repayment of Debts) Act (I of 1955), section 4 and Madras Indebted Agriculturists (Temporary Relief) Act (V of 1954)—Effect of, on limitation for actions for recovery of debt—Debt if becomes payable by instalments—Limitation Act (IX of 1908), Article 74—If applicable.

The combined effect of the two Madras Acts V of 1954 and I of 1955, is to extend the period of limitation for recovery of certain debts against agriculturists by a period of one year, one month and 26 days. The effect of section 4 of Madras Act I of 1955 is not to attract the provision of Article 74 of the Limitation Act which applies to cases of promissory notes or bonds under which the debts are made payable by instalments. The fact that the debt due by an agriculturist has been made payable by instalments by the Legislature would not convert the promissory note or bond into one payable by instalments within the meaning of Article 74, which deals with the classification of the instruments under which money is payable and has no relevance to subsequent legislative enactments which make a debt payable in instalments, which is otherwise payable in lump-sum.

Petitions under section 25 of Act IX of 1887 praying the High Court to revise the decrees of the Court of the District Munsif (Additional) Tiruchirappalli, dated 31st July, 1957 and passed in S.C.S. Nos. 1156 and 1157 of 1957.

V. S. Rangachari and *Srinivasan,* for Petitioner.

R. T. Gopalakrishnan, for Respondents.

The Court delivered the following

JUDGMENT.—A question of limitation is involved in these two Civil Revision Petitions.

The petitioner as plaintiff instituted two small causes suits against the two respondents who had executed promissory notes to him, one on 8th July, 1952, and the other on 9th August, 1952. Both the suits were filed on 4th June, 1957 and in order to escape the bar of limitation reliance was placed upon the provisions of Madras Act V of 1954 and Act I of 1955. The combined effect of these two Acts were to extend the period of limitation for a period of 1 year, 1 month and 26 days. The suits were not laid even within this extended period. The District Munsif dismissed both the suits on the ground of limitation.

The argument of the learned counsel for the petitioner is that under section 4 of Act I of 1955, the debt became payable in instalments and consequently the Article of the Limitation Act applicable to this case would be Article 74 and not Article 73. Section 4 (1) of Act I of 1955 enacts :

"Notwithstanding any law, custom, contract or decree of Court to the contrary, an agriculturist shall be entitled to pay within four months of the commencement of this Act, the interest due on any debt due by him up to the commencement of this Act and one-eighth of the principal outstanding or one-fourth of the total amount outstanding whichever is less, and the balance of the debt in three equal annual instalments on or before the 1st July of each of the succeeding years with the interest due on such instalments up to that date."

The *Explanation* and the rest of the section may be omitted as not necessary for my present purpose. The Act came into force on the 1st of March, 1955. The argument is that by reason of section 4 (1) of the Act, every debt payable by an

* C.R.P. Nos. 1851 and 1854 of 1957. 10th March, 1959.

agriculturist on demand under a promissory note became a debt payable by instalments and therefore Article 74 would apply.

Article 74 reads thus :

" Description of the suit :—On a promissory note or bond payable by instalments ".

It is stated that the phrase " payable by instalments ", does not qualify the phrase " on a promissory note or bond " but must be construed independently as applying to every promissory note debt which could be repaid by instalments by virtue of section 4 of Act I of 1955.

It does not appear to me to be permissible to split up the language of Article 74 in the manner suggested by the learned counsel for petitioner. The phrase " payable by instalments " necessarily qualifies the phrase " promissory note or bond " and can only apply to an instrument of that character. That the debts sued on here have been made repayable by instaments by the Act of the Legislature would not convert the promissory note or bond under which the debt is due, into a bond or note payable by instalments. The Limitation Act deals with different categories of suits and for the purpose of providing separate periods of limitation it has to classify the instruments on which money was payable. The Legislature was concerned in enacting the Limitation Act only with the classification of the instruments under which money was payable and not with any subsequent contingencies including legislative enactments which rendered debts payable on a particular date in a lump sum payable by instalments.

The learned counsel drew my attention to a decision of Ramachandra Iyer, J., in *Savada Goundar* v. *Veerappa Goundar*[1]. There the question for consideration was whether an acknowledgment made in respect of a promissory note debt after the expiry of three years from the date of the promissory note but within the time allowed by Ordinance V of 1953 was a valid acknowledgment. The learned Judge purported to follow the decisions in *Sambayya* v. *Pedda Subbayya*[2], and *Firm Kamta Prasad* v. *Gulzarilal*[3], in coming to the conclusion that the acknowledgment made at a time when the period of limitation had not expired for filing a suit was a valid acknowledgment. I am unable to see what relevance has that decision to the point arising for determination in these revision petitions. It will be noticed that by section 3, Act V of 1954 prohibits the filing of a suit or application for execution of a decree against an agriculturist before the 31st March, 1955. The language of section 4 of Act I of 1955 is entirely different. It merely provides for payment of the debt in instalments. That is not the same as prohibiting the filing of a suit for the recovery of a debt. Sections 3 and 8 of Act I of 1955 provide for bar of suits and applications and exclusion of time for limitation. The language of these provisions is explicit and prohibits the institution of any suit before the expiry of four months from the commencement of that Act. I am therefore unable to agree with the learned counsel for the petitioner that the language of section 4 of Act I of 1955 has the effect of prohibiting the filing of any suit against an agriculturist for recovery of a debt or converting a promissory note payable on demand into a promissory note payable by instalments. The learned District Munsiff was, therefore, correct in his conclusion that Article 74 of the Limitation Act would not apply. The further argument of the learned counsel that if it applied, the suit would have been in time in respect of the instalments subsequent to the first instalment does not call for any notice.

The revision petitions are dismissed with costs in Civil Revision Petition No. 1854 of 1957.

R.M. *Petitions dismissed.*

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1. (1959) 1 M.L.J. 312.
2. (1937) 2 M.L.J. 703.
3. A.I.R. 1955 All. 41.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

The Jaga Button Industries, Limited, by Managing Partner Sri Kondaswami Naidu, Coimbatore .. *Appellant**

v.

The State of Madras by Collector of Coimbatore .. *Respondent.*

Madras General Sales Tax Act (IX of 1939), *sections* 11 *and* 12 *to* 12-*D and* 18-*A—Scope of—Suit challenging assessment to tax on ground of illegality as offending Article* 286 (2), *Constitution of India and section* 22, *General Sales Tax Act—Jurisdiction of Civil Court—Civil Procedure Code (V of* 1908), *section* 9—*Bar of civil suit—Sales Tax Continuance Order* (1950)—*Scope and effect of.*

Section 18-A of the Madras General Sales Tax Act withdraws from the purview of the civil Courts suits for setting aside or modifying assessments made under that Act. Hence under section 9, Civil Procedure Code, the jurisdiction of the Civil Courts is barred.

Valli Ammal v. *Corporation of Madras,* (1912) 23 M.L.J. 531 : I.L.R. 38 Mad. 41 ; *Jagannatha* v. *Kutumbarayudu,* (1914) 27 M.L.J. 233 : I.L.R. 39 Mad. 21; *Suraj Narain* v. *Kamal,* A.I.R. 1946 Pat. 385 and *State of Bombay* v. *Adamjee,* A.I.R. (1951) Cal. 147, relied on.

Where a suit in substance seeks to modify or set aside an assessment, it cannot be maintained in the civil Court. His remedy is that provided by sections 11 and 12 to 12-D of the Act, which is a self-contained Act and prescribes a special machinery for the redress of the grievances. A plaintiff can urge before the civil Court only those pleas which the sales-tax authorities are precluded from entertaining.

Public Prosecutor v. *Ramalingam Pillai,* (1958) 2 M.L.J. 243, referred to.

Though an assessment which was perfectly valid before the commencement of the Constitution might be open to attack as being illegal, as offending Article 286 (2) of the Constitution and section 22 of the Madras General Sales Tax Act, being an assessment on sales outside the State of Madras, yet assessments on transactions of sales relating to 1950 to 1951 are saved from illegality by reason of the Sales Tax Continuance Order, 1950, notwithstanding that the imposition is contrary to Article 286 (2) of the Constitution.

East India Match Factory v. *State of Madras,* (1954) 2 M.L.J. 585 : 5 S.T.C. 269; *Vedupalli Satynarayanamurthy* v. *State of Madras,* (1955) 6 S.T.C. 405; *Palaniswami Nadar* v. *State of Madras,* S.A. No. 1186 of 1955 and *Indian Drugs Co., Tuticorin* v. *State of Madras,* S.A. No. 818 of 1956, followed.

Appeal against the Decree of the District Court of Coimbatore in Appeal Suit No. 313 of 1954 preferred against the Decree of the Court of the Subordinate Judge of Coimbatore in Original Suit No. 185 of 1953.

G. R. Jagadisa Iyer and *V. S. Ramakrishnan,* for Appellant.

The Additional Government Pleader (*K. Veeraswami*) and *G. Ramanujam,* for Respondents.

The Court delivered the following

JUDGMENT :—This is a Second Appeal preferred against the decree and judgment of the learned District Judge of Coimbatore in A. S. No. 313 of 1954 reversing the decree and judgment of the learned Subordinate Judge of Coimbatore in O.S. No. 185 of 1953.

In regard to an assessment under the Madras General Sales Tax Act, the appellant has been challenging the levy of the same on the ground that it was taxation of sales outside the State of Madras, and offending against Article 286 of the Constitution and section 22 of the General Sales Tax Act which incorporates Article 286 (2) of the Constitution and was illegal. This contention was upheld by the trial Court and on the ground that the assessment was bad on the foot just now mentioned and the suit of the plaintiff was decreed. On appeal the learned District Judge held that the assessment could be supported on the ground that there was no

* S.A. No. 944 of 1956.

6th November, 1958.
15th Kartika 1880—Saka.

evidence in the case to show that the purchasers of the goods now in question did not purchase them for export outside the State, and he left open the other question whether the suit is or is not maintainable by reason of section 18-A of the General Sales Tax Act. That section provides that no suit or other proceedings shall, except as expressly provided under this Act, be instituted in any Court to set aside or modify any assessment under this Act. Therefore he allowed the appeal by the State. The defeated assessee has preferred this Second Appeal.

Under section 9 of the Code of Civil Procedure, Civil Courts have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred ; *Suraj Narain* v. *Jamil*[1], *Jagannatha* v. *Kutumbarayudu*[2], *State of Bombay* v. *Adamjee*[3], and *Valli Ammal* v. *Corporation of Madras*[4]. Section 18-A of the Madras General Sales Tax Act withdraws from the purview of the civil Courts suits for setting aside or modifying assessments made under the said Act.

The plaint states that the order passed by the Deputy Commissioner is illegal and *ultra vires* and not sustainable on the merits of the case, as also the orders of the Sales Tax Officers. This cannot be agitated in a civil Court and the decision of the Privy Council in *Raleigh Investment Co. Ltd.* v. *Governor General in Council*[5], furnishes the answer. The Judicial Committee held that an assessment made under the machinery provided by the Act is not a nullity, like an order of Court lacking jurisdiction. Reliance of such a provision is not an excess of jurisdiction, but a mistake of law made in the course of its exercise, and the suit is in truth directed exclusively to set aside or modify "an assessment made under the Act" and hence it is not maintainable. Their Lordships further pointed out that the circumstances that the assessing officer had taken into account an *ultra vires* provision of the the Act is, in this view, immaterial in determining whether the assessment is made under the Act. The phrase describes the provenance of the assessment and does not relate to its accuracy in point of law. The use of the machinery provided by the Act, not the result of that use, is the test. It is apparent that where the form of prayer did not use the very words but the substance is clear that a modification or setting aside the assessment is sought for, the plaintiff-assessee has to seek the remedy provided under section 11 and 12 to 12-D of the Act, which is a self-contained Act and prescribes a special machinery for the redress of the grievance. Therefore, the declaration sought for in this case cannot be regarded as having any relevancy except as leading up to the claim for repayment. Therefore, the learned advocate for the appellant has not succeeded in taking this case out of the purview of the hierarchy of tribunals constituted for this purpose under the Madras General Sales Tax Act which is a self-contained and comprehensive legislation which enables an assessee to question the assessment imposed on him. Hence a person who is dissatisfied with the assessment and seeks to set it aside or modify cannot go before the civil Court ; but it will be open to him to raise before the Civil Court only these pleas which these authorities under the Act are precluded from entertaining ; *Public Prosecutor* v. *Ramalingam Pillai*[6].

There is no doubt that in this case the assessment was perfectly valid before the coming into existence of the Constitution. It is equally clear that after the coming into existence of the Constitution this levy of assessment on sales outside the State would be certainly illegal. But the transactions in this case relate to 1950-51. In this connection the learned advocate for the Government points out that by reason of the Sales Tax Continuance Order, 1950, published in the *Gazette of India* (Extraordinary) dated 26th January, 1950, any tax on the sale or purchase of goods which was being lawfully levied by the Government of any State immediately before the commencement of the Constitution of India shall continue to be levied, notwithstanding that the imposition of such tax is contrary to the provision contained in clause (2), Article 282, of the Constitution.

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1. A.I.R. 1946 Pat. 385.
2. I.L.R. 39 Mad. 21
3. A.I.R. 1951 Cal. 147.
4. (1912) 23 M.L.J. 531 : I.L.R. 38 Mad. 41.
5. (1947) 2 M.L.J. 16 : (1947) F.L.J. 45 : 1947 F.C.R. 59 (P.C.).
6. (1958) 2 M.L.J. 243.

That these sales are saved from illegality by reasons of the Sales Tax Continuance Order, 1950, has been upheld in two reported cases, namely, the *East India Match Factory* v. *State of Madras*[1], where it is pointed out that if Article 286 (2) applied, the President's Order issued thereunder justified the levy of the tax by the State of Madras up to 31st March, 1951. In *Vedupalli Satyanarayana Murthy* v. *State of Madras*[2], it was held that if the sales fell within Article 286 (2) they would be liable to tax under the Sales Tax Continuance Order, 1950, of the President made thereunder.

I have dealt with these two points in two recent decisions : *Palaniswami Nadar* v. *State of Madras*[3], and *Indian Drugs Co., Tuticorin* v. *State of Madras*[4].

This Second Appeal fails and is dismissed but in the circumstances without costs.

P.R.N. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA AYYAR.

C. P. Ramaswamy Naidu .. *Petitioner**

v.

Salammal and others .. *Respondents.*

Madras Court-fees and Suits Valuation Act (XXIV of 1955), *Schedule II, Article* 11 (*l*) *and* (*n*)*—Filing of an award by an Arbitrator—Court-fee payable.*

Arbitration Act (*X of* 1940), *section* 14*—Filing of an award by an Arbitrator—Court-fee payable.*

Under section 14 of the Arbitration Act there is a well-marked distinction between a case where an Arbitrator himself applies to have the award filed and a case where the parties pray the Court for giving direction to him to file the award. Article 11 (*n*) of Schedule II of the Madras Court-fees and Suits Valuation Act would apply only to cases where the parties to an award seek a direction of the Court for directing an Arbitrator to file the award. It cannot apply to cases where an Arbitrator, without any direction of the Court, himself proceeds to file the award under section 14 (2) of the Arbitration Act. To such cases the residuary provision in Article 11 (*l*) of Schedule II of the Court-fees and Suits Valuation Act will apply.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the Subordinate Judge, Salem, dated 3rd September, 1958 and made in unfiled O.P. No.... of 1958.

D. Ramaswami Ayyangar and *S. Natarajan*, for Petitioner.

P. R. Varadarajan and The Additional Government Pleader (*K. Veeraswami*), for Respondents.

The Court delivered the following

JUDGMENT.—This Civil Revision Petition is directed against the order of the learned Subordinate Judge in O.P. No..... of 1958 directing the petitioner to pay Court-fee as under Article 11 (*n*) of Schedule II of the Court-fees Act of 1955.

The petition that was filed in the lower Court was at the instance of the Arbitrator under section 14 (2) of the Arbitration Act, 1940, for filing the award passed by him. The petition was filed with a Court-fee of Rs. 10 under Article 11, sub-clause (*l*) of Schedule II of the Act. The learned Subordinate Judge held that the Court-fee paid was insufficient and that the proper Court-fee was payable under Article 11 (*n*); Article 11 (*n*) states :

> " Application under section 14 or section 20 of the Arbitration Act, 1940, for direction for filing an award or for an order for filing an agreement and application for enforcing foreign awards—"

It is not necessary for the purposes of the present case to refer to the rest of the Article. Article 11 (*l*) refers to the original petitions not otherwise provided for.

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1. (1954) 2 M.L.J. 585 : 5 S.T.C. 269.
2. (1955) 6 S.T.C. 405.
3. S.A. No. 1186 of 1955.
4. S.A. No. 818 of 1956.

* C.R.P. No. 1622 of 1958.

21st April, 1959.
(1st Vaisaka, 1881, Saka.)

The question therefore is whether the application for filing the award under section 14 of the Arbitration Act at the instance of the Arbitrator would come under Article 11 (*n*). If it does not come under that Article, the residuary provisions under sub-clause (*l*) would apply.

Under section 14 of the Arbitration Act there is a well-marked distinction between the case where the Arbitrator himself applies to have the award filed and the case where he omits to do so and the party prays the Court for giving directions to the Arbitrator to file the award. Section 14 (2) runs thus :

"The Arbitrator or Umpire shall, at the request of any party to the arbitration agreement or any person claiming under such party or if so directed by the Court and upon payment of the fees and charges due in respect of the arbitration and award and of the costs and charges of filing the award, cause the award or a signed copy of it, together with any depositions and documents, which may have been taken and proved before them, to be filed in Court, and the Court shall thereupon give notice to the parties of the filing of the award."

This section uses the word 'directed' only to cases where the party applies to the Court for the purpose of making the Arbitrator file the award. The word 'directed' does not apply to a case where the Arbitrator himself applies for the filing of the award as no direction of the Court would be necessary for the Arbitrator to file the award which he can do at any time. The distinction between the case of an Arbitrator himself filing an award and the case where one of the parties to the reference wants to compel him to file an award has been recognised in the periods of limitation prescribed for each of the remedies. As Article 11 (*n*) of Schedule II of the Court-fees Act contemplates an application seeking a direction for filing an award, it can only comprehend the case where the party wants a direction from Court to the Arbitrator to file the award. It cannot apply to a case where without any direction of the Court the Arbitrator under the right given to him under section 14 (2) himself proceeds to file the award. Such a case has not been provided for in Article 11 (*n*) or elsewhere in the Act. It therefore follows that the present case would come only under Article 11 (*l*) of the Court-fees Act and the Court-fee paid on the application in the lower Court was correct.

The lower Court's order is set aside and the lower Court is directed to take the application on its file and dispose of it afresh in accordance with law. No order as to costs.

R.M. ——— *Revision allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA AYYAR.

Kanakasabai Pillai .. *Petitioner**

v.

Muthayyan and others .. *Respondents.*

Tanjore Tenants and Pannaiyal Protection Act (XIV of 1952), *sections* 12 (1) *and* 13 (1)—*Power of Conciliation Officer to decide incidental questions—What orders are appealable.*

It is no doubt true that section 12 (1) of the Tanjore Tenants and Pannaiyal Protection Act, 1952, does not specifically enable a Conciliation Officer to decide the questions whether a particular person is a panniyal or not and whether a landlord is entitled to the exemption under the Act. Those questions could nevertheless be considered as incidental or collateral, but only as incidental, to the adjudication of the question of re-instatement of the dismissed panniayal under section 12 (1) of the Act. If, however, the question of such relationship is a substantial point in dispute the jurisdiction of the Conciliation Officer could be exercised only under section 13 (1) of the Act and any order made under that sub-section will be appealable under section 13 (2) of the Act.

Petitions under section 115 of Act V of 1908 and section 5-A of Madras Ac XIV of 1952, as amended by Madras Act XXV of 1956, praying the High Cour to revise the Orders of the Revenue Court, Kumbakonam, dated 3rd July, 1958 and made in A.P. Nos. 3 to 6 of 1958, respectively (M.P. Nos. 38, 29, 40 and 39 of 1957, Conciliation Officer, Mayuram).

* C.R.P. Nos. 19 to 22 of 1959. 1st July, 1959.

T. S. Kuppuswami Ayyar and *T. R. Venkataraman*, for Petitioner.

S. Mohan Kumaramangalam, K. V. Sankaran and *S. Ramaswami*, for Respondents.

The Court delivered the following

JUDGMENT.—These Civil Revision Petitions are directed against the orders in A.P. Nos. 3 to 6 of 1958 on the file of the Revenue Court, Kumbakonam. The landlord is the petitioner in all these petitions. The respective respondents in these petitions filed applications before the Conciliation Officer, Mayuram, alleging that they were pannaiyals under the petitioner who owned more than 6 $\frac{2}{3}$ acres of lands in Tanjore District, that the petitioner refused to give them the kalavadai due to them and that he improperly dismissed them from service, when they demanded kalavadai as per the terms of what is known as Mayuram agreement. The petitioner resisted the applications on the ground that he owned less than 6 $\frac{2}{3}$ acres of lands, that the respondents were never his pannaiyals but only causal labourers, and that in any event, he was not liable for the kalavadai claimed by respondents. The Conciliation Officer accepted the case of the respondents and directed their reinstatement under section 12 (3) of the Tanjore Pannaiyal Protection Act, 1952 (Madras Act XIV of 1952). He also directed payment of kalavadai to the respective respondents. That order was under section 13 (1) of the aforesaid Act. Against the orders of the Conciliation Officer the landlord filed four appeals, purporting to be under section 13 (2) of the Act, to the Revenue Court, Kumbakonam. The Revenue Court held that while an appeal would lie in regard to direction of payment of kalavadai, no appeal would lie in regard to the other questions involved in the case namely, (1) whether the respective respondents were pannaiyals of the petitioner and (2) whether the landlord was exempted from the provisions of Madras Act XIV of 1952 on the ground that he owned less than 6$\frac{2}{3}$ acres of lands. The landlord has come up in revision against the orders of the Revenue Court, holding that he was not entitled to an appeal against that portion of the order of the Conciliation Officer which held that the respondents were pannaiyals of the petitioner and that the landlord was not entitled to the exemption pleaded.

The learned advocate for the petitioner, Mr. T. S. Kuppuswami Iyer, contended that the plea of the petitioner, that the respondents were not his pannaiyals, and the further plea, that the landlord was exempt from the operation of the Act by reason of holding less than 6$\frac{2}{3}$ acres of lands, were really disputes that would come within section 13 (1) of the Act, and that there could be a right of appeal against the decision rendered on those questions by the Conciliation Officer under section 13 (1) of the Act. On the other side it was contended that the questions involved in the case would really come within section 12 of the Act in respect of which there is no right of appeal.

To appreciate the contentions it is necessary to refer to the relevant provisions. Section 12 of the Act states thus:

"12. (1) Whenever a landowner dismisses a pannaiyal, he shall within a week from the date of such dismissal, make a report thereof to the Conciliation Officer having jurisdiction over the area.

(2) ....

(3) After considering the representation, if any so made, and after making such further inquiry into the case as he may deem fit, the Conciliation Officer may, if he finds that the dismissal of the panniyal was not just and proper, by an award in writing, require the landlowner to take back the pannaiyal and reinstate him in all the rights which would have accrued to him but for his dismissal.

13. (1) Save as otherwise expressly provided in this Act, any dispute between a landowner and a pannaiyal including any matter which affects their mutual harmonious relationship in the cultivation of land, or any question which may arise as to the payment or non-payment of any wages shall, on application by any party, be decided by the Conciliation Officer.

(2) Against any final order passed by a Conciliation Officer under sub-section (1), an appeal shall lie to the Revenue Court within thirty days of the passing of the order unless the Court in the special circumstances of any case, condones the delay in preferring the appeal within that time; and the decision of the Revenue Court on such appeal shall be final."

It is unnecessary to refer to the other portion of the section. The question whether a pannaiyal would be entitled to reinstatement would undoubtedly come

within section 12 (1). Mr. T. S. Kuppuswami Iyer, the learned advocate, for the petitioner, contended that the provisions of section 12 (1) would only apply to the case of admitted relationship of landlord and pannaiyal and where such relationship is denied by one side or the other, the Conciliation Officer will have no jurisdiction to proceed under section 12 but could proceed to decide the dispute under section 13 (1). He therefore, contended that the decision in the instant case would be subject to an appeal provided under section 13 (2). I cannot, however, agree with the contention in the form in which it was urged before me. It is, no doubt, correct to say that section 12 confers power to the Conciliation Officer to require the landowner to take back the pannaiyal and reinstate him with all the rights which would have accrued to him but for his dismissal. But as an incident to the power, he would, in my opinion, have a right to enquire into the further question whether the relationship of the landlord and pannaiyal subsisted between the parties and whether the landlord was entitled to the exemption under the Act. Those questions, though they do not come strictly within section 12 (1), could nevertheless be considered as an incident or collateral to the adjudication of the question under section 12 (1), that is, the question of reinstatement. But determination of such question would only be an incidental one. If, however, the question of relationship is a substantial item of dispute, the jurisdiction of the Conciliation Officer to decide that dispute would be only under section 13 (1). Section 13 (1) confers power upon the Conciliation Officer to decide any dispute between a landowner and a pannaiyal except those otherwise expressly provided in the Act. Section 12 confers a power only to reinstate a pannaiyal. The incidental questions, for example, whether at all there was relationship of landlord and pannaiyal between the parties or whether the provisions of the Act would apply to the particular landlord which may have to be decided for the purpose of exercising jurisdiction under section 12, cannot confer on the Authority under section 12 a power to finally adjudicate those questions. They will, therefore, come only under the provisions of section 13 (1). If an adjudication is made under section 13 (1) an appeal would lie under section 13 (2). Therefore, in the present case whether there was at all relationship of landlord and pannaiyal between the parties, and whether the landlord was not exempted from the operation of the Act are questions which could be adjudicated only by virtue of section 13 (1). The petitioner would have a right to appeal against the decision of the Conciliation Officer to the Revenue Court. The lower Court is in error in declining to entertain the appeals. The orders of the lower Court are set aside, and it is directed to restore the appeals to its file and dispose of them in accordance with law. There will be no order as to costs.

R.M. — *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN.

N. R. Narayanaswamy Iyer .. *Petitioner**

v.

Ramier .. *Respondent.*

Madras Indebted Agriculturists' (Repayment of Debts) Act (I of 1955), section 2 (a) (1) and Explanation I—*Applicability and scope of—Joint Hindu family paying more than Rs. 150 as land revenue—Coparcener not shown to be paying land revenue in excess of limit—If excluded from category of agriculturist.*

Explanation I to section 2 of Madras Act (I of 1955) only provides that where a joint family...... ......is an agriculturist, every coparcener shall be deemed to be an agriculturist provided he does not fall under any of the categories specified in sub-clauses (i) to (v) ; but the *Explanation* cannot be extended to cover a converse case—that is to say, where the joint family ceases to be an agriculturist because of the operation of section 2 (*a*) (i), every member of that joint family also ceases to be an agriculturist within the meaning of section 2 (*a*). The joint family as such is a separate entity, and the individual coparcener in relation to his individual liability is a distinct juristic entity, distinct from that coparcenary.

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* C.R.P. No. 419 of 1958. 26th March, 1959.

Where all that is shown is that the defendant was a member of a joint family which paid more than Rs. 150 as land revenue, but there is nothing to show that the defendant himself in his individual capacity paid anything beyond the monetary limit fixed by section 2 (*a*) (i), the defendant cannot be held to fall within the scope of the exclusion specified in section 2 (*a*) (i).

Petition under section 25 of the Act IX of 1887, praying the High Court to review the Decree of the Court of the District Munsif of Valangiman at Kumbakonam, dated 6th December, 1957, and passed in S.C.S. No. 376 of 1957.

R. Viswanathan, for Petitioner.

T. R. Ramachandran, for Respondent.

The Court delivered the following

JUDGMENT.—It was only on the ground of limitation that the plaintiff's claim against the defendant to recover the money due under the promissory note was dismissed. It is the correctness of that conclusion that is the subject-matter of this application for revision.

It is common ground that unless the provisions of Madras Act I of 1955 could apply, the plaintiff's claim would be beyond the period of limitation. The promissory note was executed on 10th February, 1953, and the suit was filed on 4th September, 1957. The plaintiff could claim the benefit of the period excluded under section 5 of Act V of 1954. But since the suit was filed only on 4th September, 1957, unless the time which can be excluded under Act I of 1955 is also excluded, the claim would be out of time. In deciding whether the defendant is an agriculturist within the meaning of section 2 of Act I of 1955, what I have to consider is really whether the defendant comes within the scope of the exclusion in section 2 (*a*) (i). The defendant's specific case was that the joint family of which he and his brother were members paid land revenue beyond the limit prescribed by section 2 (*a*) (i), that is Rs. 150. *Explanation* 1 of section 2 runs :

"Where a joint family............is an agriculturist, every coparcener........shall be deemed to be an agriculturist provided that he does not fall under any of the categories specified in sub-sclauses (i) to (v)".

As the learned counsel for the petitioner points out, that *Explanation* cannot be extended to cover a converse case, that is, where the joint family ceased to be an agriculturist because of the operation of section 2 (*a*) (i), every member of that joint family also ceased to be an agriculturist within the meaning of section 2 (*a*). It should be remembered that the joint family as such is a separate juristic entity, and the individual coparcener in relation to his individual liability is a distinct juristic entity, distinct from that coparcenery. As I said, the learned counsel for the petitioner is well-founded in his contention, that *Explanation* I does not cover the case of the defendant. Now we are left with this position, that the joint family of which the defendant is a member pays more than Rs. 150 as land revenue. But there is nothing to show that the defendant himself in his individual capacity paid anything beyond the monetary limit fixed by section 2 (*a*) (i). There was the claim of the plaintiff that the defendant was an agriculturist. That claim was not as such resisted. Only the defendant pleaded he came within the scope of the exclusion specified in section 2 (*a*). That has not been made out in this case.

I reverse the finding of the learned District Munsiff on the issue of limitation. This revision petition is allowed. The plaintiff's claim is decreed with costs in both the Courts.

P.R.N. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GANAPATIA PILLAI.

V. PR. RM. Velliammai Achi through her Power Agent Kathiresan Chettiar .. *Appellant**

v.

V.R.A.R.M. Chockalingam Chettiar and another .. *Respondents.*

Limitation Act (IX of 1908), *Article* 182 (2) *and* (5)—*Applicability and scope*—" *In accordance with law* "—*Application for execution of final decree for sale in mortgage suit pending appeal from preliminary decree*—*If one in accordance with law*—*Order on such application*—*If saves limitation.*

The mere pendency of an appeal against a decree does not operate as a stay of execution of that decree. An application for execution of the final decree in a mortgage suit for sale of the hypotheca, made during the pendency of an appeal from the preliminary decree, must be deemed to be one " in accordance with law ", falling under Article 182 (5) of the Limitation Act. From the final order passed on such an application, the decree-holder would have the benefit of three years for a second execution petition. If the preliminary mortgage decree is varied or modified by the appellate Court decree, the variation or modification must be deemed to be automatically incorporated in the decree of the trial Court and the second execution petition must be deemed to be one seeking to execute the trial Court's final decree as modified by the appellate Court's decree.

Sivaramachari v. *Anjaneya Chetty*, (1951) 2 M.L.J. 245 : I.L.R. (1952) Mad. 277 (F.B.) and *V. Subba Rao* v. *Kesavayya*, (1955) An. W.R. 492 : A.I.R. 1955 Andhra 254, followed.

Periakaruppan Chettiar v. *Venugopal Pillai*, (1946) 1 M.L.J. 347, explained.

The various clauses in Article 182, Limitation Act, are disjunctive and the decree-holder has the option of taking the benefit of any one clause in any case for saving his application from the bar of limitation. Clause (2) of Article 182 will not preclude the applicability of clause (5) or clause (1) thereof in any case where an appeal has been preferred. Where clause (5) applies, it is immaterial whether the execution petition would be in time under clause (2).

A preliminary decree in a mortgage suit was passed on 31st March, 1949 and a final decree followed on 10th March, 1950. In the meanwhile an appeal had been preferred by the judgment-debtor against the preliminary decree ; this was dismissed on 16th November, 1959 ; but the cross-objections preferred by the decree-holder with regard to the costs of the suit were allowed.

While the appeal was pending, the decree-holder filed an execution petition on 4th July, 1950, for sale of the properties. He did not obtain satisfaction in that petition which was dismissed on 3rd July, 1951. The decree-holder made another execution application on 9th April, 1954, which was dismissed by the lower Courts as barred by limitation on the ground that it was made more than three years from the date of the appellate decree.

Held : that Article 182 (5) applied, and the application was in time, as it was filed within three years from the date of the final order on the first application for execution (31st July, 1951).

Appeal against the Order of the District Court of Ramanathapuram, dated the 11th day of December, 1956 and made in A.S. No. 140 of 1956, preferred against the Order of the Court of the Subordinate Judge of Devakottai, in E.P. No. 112 of 1954, in O.S. No. 125 of 1948.

A. Sundaram Ayyar and *N. Palaniappan*, for Appellant.

P. S. Chandrasekharan and *P. S. Ramachandran*, for Respondents.

The Court delivered the following

JUDGMENT.—This Second Appeal is preferred by the decree-holder in O.S. No. 125 of 1948 on the file of the Court of the Subordinate Judge, Devakottai. He filed E. P. No. 112 of 1954 in that suit for bringing the mortgaged properties to sale in excution of the mortgage decree which he had obtained. An objection was taken to this execution by the judgment-debtor based upon limitation, and this objection found favour with both the lower Courts and the execution petition was dismissed as barred by time. Hence, the appeal.

The few facts necessary to appreciate the contention are the following. A preliminary mortgage decree was obtained on 31st August, 1949. A final decree followed on 10th March, 1950. In the meantime, an appeal had been preferred by the judgment-debtor against the preliminary decree of the trial Court, and this appeal

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* A.A.A.O. No. 52 of 1957. 25th March, 1959.

was disposed of on 16th January, 1951. It is common ground that the appeal of the judgment-debtor was dismissed. But the cross-objection preferred by the decree-holder which related to costs of the mortgage suit was allowed. By the decree of the appellate Court, the decree-holder was given a personal decree for costs against the judgment-debtor. When the appeal was pending, the decree-holder filed E. P. No. 165 of 1950 on 4th July, 1950, for bringing the mortgaged properties to sale. However, he did not obtain satisfaction in that execution petition, which was dismissed on 31st July, 1951. Then, he brought E.P. No. 112 of 1954, out of which the present appeal has arisen This execution petition which is the second petition was filed on 9th April, 1954. The lower Court took the view that this execution petition was barred by time as it was filed more than three years from the date of the appellate decree.

Both the lower Courts have misconstrued the effect of the decisions cited before them and also Article 182 of the First Schedule to the Limitation Act, which governs the question of limitation for execution petitions. There are as many as six clauses to this Article in Column 3, which relates to the time from which the period begins to run. Clause (1) in Column 3 of Article 182 mentions the starting point as the date of the decree or order. Clause (2) mentions the starting point as the date of the decree or order of the appellate Court where there has been an appeal. Clause (3) deals with a case where there has been a review of judgment. Clause (4) deals with a case where the decree has been amended. Clause (5) which directly applies to this case is in these terms :—

"Where the application next hereinafter mentioned has been made, the date of the final order passed on an application made in accordance with law to the proper Court for execution, or to take some step-in-aid of execution of the decree or order."

Without referring to any authorities on the question, if the plain words of the section are applied, a second execution petition will fall under clause (5) of Article 182 and will be in time if it is filed within three years from the date of the final order passed on the first execution petition, provided the first execution petition was in accordance with law.

Mr. Ramachandra Ayyar, learned counsel for the respondents, valiantly argued that the first execution petition in this case was not in accordance with law, because after a decree is varied or confirmed or reversed by an appellte Court, it is the decree of the appellate Court alone that is executable. However, he conceded fairly enough that, if before a decree could be passed by the appellate Court, the decree of the trial Court is executable and has been executed, such execution would be in accordance with law. It is indisputable that the mere pendency of an appeal against a decree does not operate as stay of execution of that decree. That being so, I am unable to find any reason why, if execution of the trial Court's final decree in a mortgage suit for sale of the hypotheca during the pendency of the appeal would be in accordance with law, an execution petition preferred for that purpose should not be treated as one in accordance with law. Certainly, if execution of the final decree was legal during the pendency of the appeal, the execution petition must necessarily be deemed to be one in accordance with law, and, therefore, falling under clause (5) in Column 3 of Article 182. From the final order in such an execution application, the decree-holder would have the benefit of counting three years for the second execution petition. The only objection which Mr. Ramachandra Ayyar urges against this view is that, in such a case, a second execution petition would not be execution of the appellate Court's decree, but would be execution of the original final decree unmodified by the appellate Court's decree. I am unable to find any substance in the argument. It has been held in the Full Bench decision in *Sivaramachar* v. *Anjaneya Chetty*[1], and in *Periakaruppan Chettiar* v. *Venugopal Pillai*[2], and *V. Subba Rao* v. *Kesavayya*[3], that in a case where a preliminary mortgage decree is varied or

1. (1951) 2 M.L.J. 245 : I.L.R. (1952) Mad. 277.
2. (1946) 1 M.L.J. 347.
3. (1955) An. W.R. 492 : A.I.R. 1955 Andhra 254.

modified by an appellate Court decree, the modification must be deemed to have been automatically incorporated in the decree of the trial Court and the second execution petition must be deemed to be one which seeks execution of the trial Court's final decree as modified by the appellate Court's decree. In the case of mortgage suits, these authorities are uniform and do not give any room for the contention that a different interpretation is possible. The learned District Judge distinguished the decision in *Periakaruppan Chettiar* v. *Venugopal Pillai*[1], relying on the following sentence which occurs at page 351 of the report :—

> "We do not think that, so long as the decree itself has been kept alive, there can be a bar of limitation to an application of this sort. Such application really calls upon the Court to carry out modifications, which in law automatically takes place in the final decree already passed before the decree of the appellate Court."

This sentence was intended to meet the argument that the application for amendment of the decree of the trial Court to be made by the decree-holder after the appellate Court had passed its decree, should be within time to enable the decree-holder to execute the appellate decree. That argument is repelled by the Bench by the observation that, so long as the decree itself is kept alive in the sense of its being not barred by limitation for the purpose of execution, any application by the decree-holder for bringing the trial Court's final decree into conformity with the decree of the appellate Court would certainly be in time. The learned District Judge has misunderstood this observation to mean that the decree in the case now before me was not kept alive on the date when the second execution petition was filed. For this purpose, he made use of the principle that, after a decree is modified by an appellate decree, it is the appellate decree alone that is capable of execution. That principle has nothing to do with finding out if E. P. No. 112 of 1954 was in time. There is a lucid exposition of the scheme of Article 182 at pages 285 and 286 of the report in the Full Bench decision cited above. The central idea expounded therein is that the various clauses appearing in Article 182, Column 3, are disjunctive. That is to say, the decree-holder has the option of taking the benefit of anyone clause in any case for contending that execution was within time. That does not mean that clause (2) therein precludes the applicability of either clause (5) or clause (1) in any case where an appeal has been preferred. In this case, it is clause (5) that helps the decree-holder to file the second execution application; and, if clause (5) applies, it is immaterial whether the Execution Petition would be in time under clause (2). E. P. No. 12 of 1954 was therefore in time.

This appeal is allowed, and the orders of both the lower Courts are set aside. The costs of the appeal will be paid by the respondents.

Execution will proceed from the stage at which it was left when the E.P. was dismissed by the first Court.

P.R.N. ——— *Appeal allowed; orders set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Mohammed Musa Sahib (*died*) and others .. *Appellants**

v.

N. K. Mohammed Ghouse Sahib and another .. *Respondents.*

Partnership Act (IX of 1932), *section* 4—*Partnership—Essential ingredients—Absence of provision for sharing of profits—Absence of element of agency—Effect.*

There must be three elements present before any relation which may be termed partnership can come into existence ; (1) there must be an agreement entered into by all the persons concerned; (2) the agreement must be to share the profits of a business; and (3) the business must be carried on by all or any of the persons concerned acting for all. All these elements must be present before

1. (1946) 1 M.L.J. 347.

* S.A. No. 1351 of 1955. 4th September, 1958. (13th Bhadra, 1880—Saka).

a number of persons can be called partners. To constitute a partnership there must be a community of benefit. A common interest will not make a partnership without division of profits.

Co-ownership is not partnership. One essential element of partnership is that there should be agency. One partner can always bind another partner in any matter which falls within the scope of the partnership business, subject to any limitation under section 20 of the Partnership Act. If the relationship constituted between the parties in respect of a particular matter does not expressly, or by necessary implication, involve the right of one party to pledge the credit of the other as an agent there is no partnership.

Case-law, English and Indian, reviewed.

Text books, referred to.

Appeal against the Decree of the District Court of Coimbatore, in Appeal Suit No. 391 of 1958, preferred against the Decree of the Court of the District Munsiff of Erode, in Original Suit No. 574 of 1951.

T. R. Ramachandran, for Appellants.

M. Natesan, for Respondents.

The Court delivered the following

JUDGMENT :—This is an appeal preferred against the decree and judgment of the learned District Judge of Coimbatore, in A.S. No. 391 of 1953, reversing the decree and judgment of the learned District Munsiff, Erode, in O.S. No. 574 of 1951.

On 18th November, 1939, the plaintiffs' predecessor entered into an agreement with the first defendant styling it as an ' Indenture of Partnership ' in the following terms :

" The indenture is made the 18th day of November, 1939, between K. N. Mohamed Ghouse Sahib of No. 127, Pitt Street, Penang (hereinafter called the first party) of the one part and S. E. Abdul Rahim also of No. 127, Pitt Street, Penang (hereinafter called the second party) of the other part :

Whereas the first and second parties were carrying on from the year 1925 up to the 30th day of September, 1939, the business of cattle dealers and skin merchants:

And whereas from the 30th day of September, 1939, the said partnership was dissolved by mutual consent on the understanding that the parties hereto shall each carry on a new business of cattle dealers and skin merchants under the style of N.K. Mohamed Ghouse Sahib alternately for a period of two years each at a time at the risk of the party so carrying on and whereas pursuant to the said understanding the second party has been carrying on the said business as from the 1st day of October, 1939, by himself and at his own risk :

Now this indenture witnesseth that it is hereby mutually agreed that the said parties shall become partners in the said business upon the terms hereinafter contained, *viz.*,

1. The partnership business shall be that of cattle traders and skin merchants and shall be carried on under the style or firm name of ' N. K. Mohamed Ghouse Sahib' at No. 127, Pitt Street, Penang, or at such other places in the Colony of the Straits Settlements as may be mutually decided upon.

2. The capital of the partnership shall consist of the following :—

"(*a*) The net value of the stock-in-trade, book debts and other assets (including the goodwill) as on the 30th day of September, 1939, of the business of 'N. K. Mohamed Ghouse Sahib ' carried on by the parties hereto at No. 127, Pitt Street, Penang, aforesaid, less the outstanding liabilities of the said business on that date. The said assets less the said outstanding liabilities of the said business shall be credited to the said parties as their respective shares in equal shares. But this shall be subject to re-adjustment in the event of the said liabilities ultimately proving to be more or less than what they are at present in the books.

(*b*) Any further sums which either party shall from time to time contribute for capital purposes which shall be credited to his capital account."

3. The duration of the partnership shall be from the 1st of October, 1939, until dissolution by mutual consent.

4. The management of the partnership business shall be in the hands of the second party for a period of two years from the 1st of October, 1939, and shall be in the hands of the first party for a period of two years from the 1st of October, 1941, and so on, the parties shall respectively manage the said business for alternate periods of two years at a time. The partner who is at any time managing the business shall hereinafter be called 'the partner-in-management'.

5. The net amount of capital and monies (other than monies, if any, credited for goodwill) credited to the said first party on the said 1st day of October, 1939, shall be paid by the second party to the first party on demand and the said second party shall for a period of two years from the 1st day of October, 1939, be the partner in management. Any partner in management shall have the sole and exclusive management of the partnership business and shall devote his whole-time and attention thereto and carry on and manage the same in a prudent and business like manner to the utmost of his skill and ability.

6. A partner-in-management shall during the period of his management be solely entitled to the whole profits of the said partnership business and shall be liable for all expenses, debts, outgoings and losses and shall indemnify and keep indemnified the other partner from all claims, debts, demands or actions in connection with any such expenses, debts, outgoings or losses and in connection with anything done or omitted to be done, during the management of the said partner-in-management.

7. A partner-in-management shall keep proper accounts of his management of the partnership business and shall render to the other partner one month before the expiry of his period of management a correct general account of his management together with valuations of stock-in-trade, credits and properties and showing the debts and liabilities of the business during his management and all transactions, matters and things justly comprehended in a general account of the like nature and such general account shall be balanced and, if agreed to, such balance-sheet shall be signed by both the parties hereto as approved. Account-books shall be kept at the premises of the partnership business and shall be open to the inspection of either partner at any time. The business shall be valued as at the date of expiry of the period of management of the partner-in-management and the value ascertained.

8. At the end of any period of management of a partner in management the business shall be handed over by the said partner-in-management to the other partner. Such other partner shall take over the said business paying the said partner-in-management the value of the net assets (other than goodwill) of the said business as shown by the balance-sheet agreed to by the parties as aforesaid. The said partner shall on such taking over be the partner-in-management for a period of two years and shall manage the said business on his account and at his own risk without any control or unnecessary interference from the previous partner-in-management.

9. No partner shall pledge the credit of the other partner.

10. Each partner shall—

(*a*) punctually pay his separate debts and indemnify the other partner and the partnership business against the same and all expenses on account thereof.

(*b*) be just and faithful to the other of them and at all times give to such other full information and explanation of all matters relating to the affairs of the said partnership business.

11. Either partner shall—

(*a*) not carry on or be interested in any other business in the Colony of the Straits Settlements;

(*b*) mortgage or charge his interest in the partnership or take another partner into the said business;

(*c*) endanger the partnership business or the tenancy of the premises occupied by the said partnership business in any manner whatsoever.

12. If either partner shall commit any act of bankruptcy or become physically or mentally unfit to attend to the partnership business or suffer any act which would be a ground for the dissolution of a partnership by the Court, then in any such case the other partner may by notice in writing determine the partnership and in that case he shall have the option of purchasing the interests of the other partner in the good will and other assets of the business.

13. All disputes which shall arise between the parties hereto whether during the subsistance of this agreement or thereafter in connection with this agreement or the management of the said partnership business or in relation to any act or omission by either party or any act that ought to be done by either party or in connection with any matter whatsoever touching the partnership affairs shall be referred to arbitration under the provisions of the Arbitration Ordinance ".

This business went on from 1939 to 1941, and, as stipulated in the above agreement, the first defendant took over and complied with the requirements of that agreement. Then by 1943 the conditions seem to have become unsettled in Malaya, and there has been no taking over by the plaintiff. In fact nothing has happened till 1951. Then the suit has been filed by the heirs of one of the parties of the agreement for declaring that the partnership between the first defendant and their predecessor-in-title, Abdul Rahim who had died, had become dissolved as from 26th July, 1948 at Erode, and for accounting by the first defendant.

The case for the defendant was that notwithstanding the fact that this agreement is styled as a deed of partnership and there are terms therein apparelling the parties thereto as partners, in substance and in essence this was not a partnership deed at all and no partnership was constituted thereunder and therefore no question of dissolution of partnership and taking of accounts can be granted to the plaintiffs.

The learned District Munsif came to the conclusion that there was a partnership and granted the plaintiffs the reliefs asked for. On appeal the learned District Judge came to the conclusion that the plaintiffs were not entitled to the reliefs on the foot of a partnership.

The short point for determination before me is whether under this agreement a partnership was constituted entitling the plaintiffs to the reliefs asked for. Section 6 of the Partnership Act, which embodies the well known English decision in *Cox* v. *Hickman*[1], lays down, that in determining whether a person is or is not a partner in a firm, the Court must have regard to the real relation between the parties, and that whether the relation of partnership does or does not exist must depend on the real intention and contract of the parties (*Mollow Narch & Co.* v. *Court of Wards*[2]; *Sutton & Co.* v. *Grey*[3]; *Walker* v. *Hirsch*[4]; *Badley* v. *Consolidated Bank*[5]; *King & Co.* v. *Whichelow*[6]; *Abdul Rahiman*, In re[7]; *Raghunandan* v. *Hormasjee*[8]; *McLaren* v. *S. Verschoyle*[9]; *Porter* v. *Incell*[10]; *Raghumull* v. *Official Assignee of Calcutta*[11], as appearing from the whole facts of the case (*Ross* v. *Parkyns*[12]; Ex parte *Delhasee*)[13]; and not merely on their expressed intention. *A* and *B* may in a written agreement have stated expressely that they are not partners yet they have been held to be partners (Ex Parte *Delhasee*[13], *Moore* v. *Davis*[14], or they may have stated that they are partners and have been held not to be partners, *Bhaggu Lal* v. *De Gruyther*[15]. Nature of the relation is not altered by the mere use of the word partnership, either in the agreement or in pleadings, *Abdulla* v. *Allaj Diya*[16], *Hirabbai* v. *Bhagirath R. & Co.*[17], (use of the words sleeping partner in written agreement) *Karnidan Sarda* v. *Sailaja Kanta*[18] Also see, *Mohammad Yusuf* v. *Pirmohammad*[19] *Mamooji* v.

1. (1860) 8 H.L.C. 268.
2. (1872) L.R. 4 P.C. 419, 435.
3. (1894) 1 Q.B. 285, 286.
4. (1884) 27 Ch.D. 460.
5. (1888) 38 Ch.D. 238.
6. (1895) L.J. Q.B. 801 (C.A.).
7. (1928) 51 Mad. 308, 314 : 55 M.L.J. 12.
8. (1927) 51 Bom. 342.
9. (1901) 6 Cal.W.N. 429, 438.
10. (1905) 10 C.W.N. 313, 318.
11. (1923) 28 Cal. W.N. 34.
12. (1875) 20 Eq. 331.
13. (1876) 7 Ch.D. 511.
14. (1879) 11 Ch. D. 261.
15. (1881) 4 All. 74.
16. (1927) 8 Lah. 310.
17. (1945) 47 Bom.L.R. 808.
18. I.L.R. (1940) 19 Pat. 715.
19. A.I.R. 1922 Nag. 67.

Tayebali[1]. *See* the full discussion in Om Prakash Aggarwala, "The Indian Partnership Act, p. 70" and following citing *Chimaram Motlal* v. *Jayantilal*[2] ; *Madho Prasad* v. *Gouri Dutt*[3]; *Bansi Ram* v. *Jagan Nath*[4]; *Tajmal Hussain* v. *Ahmad Ali*[5]; *Raghumall* v. *Official Receiver, Calcutta*[6]; In re *Abdul Rehman*[7]; *Mamooji* v. *Tayebali*[1]; *Chockkalinga* v. *Muthuswami*[8]. If we analyse section 4 of the Partnership Act there must be three elements present before any relation, which may be termed partnership, can come into existence : (1) there must be agreement entered into by all the persons concerned ; (2) The agreement must be to share the profits of a business, and (3) the business must be carried on by all or any of the persons concerned acting for all. *All these elements must be present before a number of persons can be called partners* (*See* G. N. Sinha on Partnership Act, 1957 edition, page 17) ; Pollock and Mulla. 'The Indian Sale of Goods and the Indian Partnership Acts' Second Edn., p. 302). In this case the first requirement has been fulfilled.

But the second element, namely, that the agreement must be to share the profits of the business, has not been fulfilled. The substance of the agreement is that the old business was wound up in 1939 and that after taking over the goodwill and the remaining stock-in-trade for over two years each of the parties to the agreement should carry on the business for two years without in any way being accountable to the other. In other words, that person who took over the two year turn was to take over all the profits and losses.

In other words, this business was nothing more than a convenient arrangemens between these people for a two year turns of a business exploiting its goodwill. It it an association for some special purpose of persons not being partners. Pollock and Mulla, *Ibid*, p. 304). Therefore the second requirement, namely, that the agreement must be to share the profits of the business does not stand made out.

It is no doubt true that though participation in the profits of a business by a person is a *prima facie* cogent, and at times strong evidence that he is a partner, the receipt of such a share or of a payment contingent on or varying with the profits does not of itself make him a partner in the business or liable as such. A creditor who supervises the conduct of a debtor's trade with an agreement that he will be paid out of the profits of the business does not thereby become his partner and cannot be held liable to third parties for the liabilities of the business. But at the same time to constitute a partnership there must be a community of benefit. That is why, as the definition of partnership involves that of joint operation for the sake of gain, a society for religious or charitable purpose is not deemed to be a partnership. A common interest will not make a partnership without division of profits.

Then coming to the third requirement, the terms of the indenture reproduced above purposely clearly show that in this case there is no question of agency and authority. The true test for determination whether a person receiving a share of profits in a business is or is not a partner in the business, is to examine whether the business was carried on by the others acting for him and whether the relationship of principal and agent subsisted between them, that is to say whether one was authorised to work on behalf of another, and not merely whether that other was sharing the profits. The question is one of agency and authority. Section 4 of the Partnership Act clearly states as reproduced above that it must be a business carried on by all or any of them acting for all. The words 'acting for all' were inserted to emphasize that partners are agents and not merely principals. One essential element of partnership, as is shown in the definition, is that there should be agency. One partner can always bind another partner in any matter which falls within the scope of the partnership business, subject to any limitation under section 20 of the Act, and if the relationship constituted between parties in respect of a particular matter does not expressly

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1. A.I.R. 1933 Sind. 210.
2. A.I.R. 1939 Bom. 410.
3. A.I.R. 1939 Pat. 323.
4. A.I.R. 1935 Lah. 209.
5. A.I.R. 1937 Oudh 438.
6. A.I.R. 1924 Cal. 424.
7. (1926) 55 M.L.J. 12 : I.L.R. 51 Mad. 308.
8. (1924) 48 M.L.J. 518 : A.I.R. 1925 Mad. 768.

or by necessary implication involve the right of one party to pledge the other as an agent, then there is no partnership. (Justice S. T. Desai in the 'Law of Partnerships in India and Pakistan,' Second edn. page 35, etc.). In this case there has been an express stipulation, to the contrary and therefore it cannot be said to prove that one of them was the agent of the other. Here it has not been shown that something was done on behalf of both without consulting the other, and which was accepted or found binding on both.

The instant case seems to be one of co-ownership. Co-ownership is not partnership. *See* the difference between co-ownership and partnership pointed out at pages 108-109 of K.M. Ghosh, 'Partnership Law in India and Pakistan.'

Therefore, the analysis of the terms of the indenture, though cast in the form of a partnership deed, does not fulfil the requirements of a partnership within the meaning of the Partnership Act. Therefore, the lower appellate Court came to the correct conclusion that the plaintiffs were not entitled to the reliefs asked for and rightly dismissed the suit. I confirm the decree and judgment of the lower appellate Court and dismiss this Second Appeal and, in the circumstances, without costs.

P.R.N. ——— *Appeal dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Vyrathammal .. *Appellant**

v.

Somasundaram Pillai and others .. *Respondents.*

Partnership Act (IX of 1932)—Suit for dissolution of partnership—Necessary parties to—Addition of parties after the period of limitation—Party proposed to be added being only a proper party—If could be added after limitation.

In a suit for dissolution of partnership and for accounts it is the duty of the plaintiff to add all the necessary parties as defendants to the suit. If he fails to do so it is not open to him to add any of them as parties after the expiry of the period of limitation for the suit. Non-joinder of a necessary party—partners or their legal representatives—in a partnership action would entail the dismissal of the entire suit. The mere fact that the party sought to be added is only a proper party and not a necessary party does not make any difference and even such a party cannot be added after the expiry of the period of limitation.

Jamna Kunwar v. *Kunj Behari*, A.I.R. 1937 All. 502, differed from.

Ambika Charan Guha v. *Tarini Charan Chanda*, (1913) 18 C.W.N. 464; *Amirchand Nagindas & Co.* v. *Raoji Bhai Moti Bhai Patel*, (1929) 58 M.L.J. 613; *Sayyed Abdul Hawk* v. *Tumuluri Vaikuntam*, (1926) 52 M.L.J. 318; *Yakub Ibrahim* v. *A. Gulambhas*, A.I.R. 1958 Bom. 51 and *Peeran Saheb* v. *Jamaluddin Sahib*; A.I.R. 1958 Andhra Pradesh, 48, referred.

Appeal against the Decree of the Court of the Subordinate Judge, Tirunelveli, in A. S. No. 52 of 1956, preferred against the Decree of the Court of the District Munsif of Tuticorin in O.S. No. 112 of 1953.

V. C. Veeraraghavan, P. S. Srisailam, V. Ratnam and *V. S. Ramakrishnan*, for Appellant.

R. Ramamurthy Ayyar, N. Panchapekesa Ayyar and *T. S. Rangarajan*, for Respondents.

The Court delivered the following

JUDGMENT.—This Second Appeal is preferred against the decree and judgment of the learned Subordinate Judge of Tirunelveli, in A.S. No. 52 of 1956, confirming the decree and judgment of the learned District Munsif of Tuticorin, in O.S. No. 112 of 1953.

The undivided father of the defendants 1 and 2, T. S. S. Subramania Pillai, and one A. R. Chidambaram Pillai of Kulasekharapatnam were carrying on a partnership business styled as "Sivaprakasam Press" at Tuticorin. Under a registered document,

* S.A. No. 774 of 1956. 24th November, 1958.
(3rd Agrahayana, 1880—Saka.)

dated 18th September, 1916, the plaintiff's father purchased 2/6th share of the said Chidambaram Pillai in the said business out of the joint family funds of the family consisting of himself and his sons, *viz.*, the brothers of the plaintiff. That transfer was recognised by the other partner, the father of defendants 1 and 2. The plaintiff's father thus became a partner in the firm for and on behalf of his family as and from 18th September, 1916. The amount to his credit as transferee partner had been duly credited in the accounts of the firm. Owing to certain domestic reasons, in 1924 the plaintiff's father effaced himself from the partnership and the plaintiff's mother, with the rather significant name of Bagampiriyal Ammal, got substituted in his place. But as a matter of fact, the father and sons seem to have been carrying on the business with the mother signing formally the important documents.

After the death of the plaintiff's father in January, 1942, the plaintiff's brothers appear to have divided the lands of the father which were in the name of the mother and they also appear to have taken over this business, Sivaprakasam Press. While the business of the firm was being continued by defendants and the plaintiff's brothers, one Kalikavalaperumal Pillai, who was locally managing the business of the firm for over 40 years, appears to have been taken in with the consent of the other partners as a working partner, having an one-fourth share in the business of that firm. This working partner was to get a share of the profits but not to participate in the losses. It was in this manner that the business was going on till the plaintiff's mother fell ill in about December, 1949.

It is stated that in or about March, 1950, in the presence of Kalikavalaperumal Pillai, the first defendant and the plaintiff, the plaintiff's mother expressed her wish to her sons that they should make some provision even while she was alive in respect of the residence and maintenance of her daughter the plaintiff. On her suggestion, to which the three brothers of the plaintiff agreed, it was settled that out of the amount standing in the account of the firm to the credit of the joint family in the name of the mother, a sum of Rs. 1,000 was to be paid at the time of the marriage of each of the four unmarried daughters and the unmarried son of the plaintiff, the total amount coming to Rs. 5,000. It was also settled that the plaintiff was to be given for her enjoyment house No. 49, South Car Street, Tirunelveli Town, which had been purchased in the name of the first defendant but out of the amount standing to the credit of the family of the plaintiff's brothers in the name of their mother. This arrangement has been implemented and there is no dispute about it or repudiation of the same earlier or now before me and to which all parties agreed, *viz.*, Rs. 5,000 was credited on 30th June, 1950, in the ledger page opened in the name of the plaintiff in the accounts of the firm and the balance of the amount of the plaintiff's brother's joint family, *viz.*, Rs. 24,685-10-6 was credited on the same date in the ledger page opened in the names of the plaintiff's brothers. In other words, under a family arrangement, in full quit the plaintiff without claim on this Sivaprakasam Press or other properties of her father, was given a sum of Rs. 5,000 and that sum stands credited in the accounts even to-day for the plaintiff and she is also said to be occupying the house. To such an arrangement great importance will be attached by Courts in the absence of proof of mistake, inequality of position, undue influence coercion and like ground and which is not the case here. The parties thereto will not be allowed to deny ignore or resile from this valid and binding arrangement. This principle will be equally applicable where some members of the family are minors : *Sidh Gopal* v. *Bihari Lal*[1]; *Binda Kuer* v. *Lalita*[2]; *Hardei* v. *Bhagwan*[3]; *Bishambar* v. *Amarnath*[4], *Dangal Ram* v. *Jai Mangal*[5].

The plaintiff's mother died on 20th April, 1950 and it will be noticed that the plaintiff's brothers have dutifully carried out the family arrangement by the entry made in the accounts on 30th June, 1950 and have allowed the plaintiff to take possession and occupy the house. It is in these circumstances that the plaintiff has filed the suit, out of which this Second Appeal arises, for dissolving the partnership

1. A.I.R. 1928 All. 65.
2. (1936) 44 L.W. 546 : 41 C.W.N. 161 (P.C.).
3. (1919) 13 L.W. 436 (P.C.).
4. 46 L.W. 94.
5. A.I.R. 1926 P. 364.

business of Sivaprakasam Press at Tuticorin and for taking of accounts. This suit was filed on 20th April, 1953. On that date Kalikavalaperumal Pillai was not on record as a defendant. On objections raised by the defendants, he was brought on record as the sixth defendant on 10th July, 1954, as per order on I.A. No. 599 of 1954. There is no dispute that if that date 10th July, 1954, has to be taken as the date for calculating the limitation period, then the suit will be plainly barred. Both the Courts below held that the suit was barred by limitation. Hence this Second Appeal by the defeated plaintiff.

The short point for determination in this Second Appeal is whether by reason of Kalikavalaperumal Pillai not being on record when the suit for dissolution of partnership and taking of accounts was filed, it is bound to fail as being barred by limitation, because if the date on which Kalikavalaperumal Pillai was brought on record, *viz.*, 10th July, 1954, is to be taken as the date of institution of the suit, then it will plainly make the suit being instituted far beyond the three year period.

The learned advocate Mr. Veeraraghavan, in an informed and interesting argument propounded that this Kalikavalaperumal Pillai will only be a proper party and not a necessary party and that therefore the bringing him on record on a later date would not make the suit barred by limitation. In support of this proposition he relied upon the decision of a Single Judge of the Allahabad High Court in *Jamna Kunwar* v. *Kunj Behari*[1]. That decision undoubtedly supports the contention of the learned advocate Mr. Veeraraghavan because it was held there.

> " There is no rule in the Code of Civil Procedure or otherwise applicable to the Courts in U.P. that no suit for accounts of a partner shall proceed unless all the partners are impleaded as plaintiffs or defendants. Nor is there any reason in equity, justice and good conscience why any such rule should be imported into the law contrary to the rules of procedure which are clearly laid down.
>
> In a suit for accounts one of the partners, without whom the suit could not proceed, was not made a *pro forma* defendant, until the claim against him was barred, *held* that once he became a party, the suit could not fail for non-joinder and the period of limitation against the contesting partners could not be affected by the fact that he was impleaded after the period of limitation had expired."

But the matter does not really stand there, because this view does not find support in the other decisions to which reference will be made presently.

In *Ramdoyal* v. *Junmenjoy Coondoo*[2], which has been referred to and followed in a decision of this Court to which reference will be made presently, it was held that in a suit brought for partnership accounts, where upon the objection raised by the defendant it was found that a necessary party defendant had been omitted and such party was afterwards added as a defendant at a time when the suit as against him was barred, that the whole suit was rightly dismissed.

In *Ambika Charan Guha* v. *Tarini Charan Chanda*[3], the facts were : The plaintiff brought a suit for the accounts of partnership making parties thereto his other partners and one only of the two sons of a deceased partner who died after the partnership business came to an end but before the suit was instituted. On objection being taken the other son of the deceased partner was brought on the record after the expiration of the period of limitation. It was held that inasmuch as all the partners or their representatives were necessary parties and inasmuch as under section 22 of the Limitation Act the suit must as regards the added defendant be deemed to have been instituted when he was made a party, the whole suit was barred by limitation.

In *Sayyed Abdul Hawk* v. *Tumuluri Vaikuntam*[4], Ramesam, J., held that even if a new partnership was constituted out of the old partnership which stood dissolved by the death of a partner the suit would be barred by limitation and would be bad for non-joinder if the other heirs of one of the partners who were admittedly alive at the date of suit were not brought on record. The learned Judge further held that all the heirs of a deceased partner ought to be made parties to a partnership action.

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1. A.I.R. 1937 All. 502.
2. (1887) I.L.R. 14 Cal. 791.
3. (1913) 18 C.W.N. 464.
4. (1926) 52 M.L.J. 318.

In *Amichand Nagindas & Co.* v. *Raoji Bhai Moti Bhai Patel*[1], the necessity for bringing on record a working partner also in a suit for dissolution of partnership and taking of accounts has been pointed out. It was held :

" If a master engages several servants successively and independently each to be remunerated by a share in the profits, and if one of these servants wishes to sue him for his share in the profits, it will not be necessary for that servant to implead all the other servants. But the position is very different when by one arrangement or contract a master and a number of servants agree that they will work together for a certain time or for a certain venture and that the whole profits will be divided among them in certain proportion ; in such a case one servant cannot get his share fixed nor get an account of the profit without making the other servants parties to his suit. The fact that no objection on the ground of the non-joinder of the other servants was taken by the master in such a suit does not give jurisdiction to the Court to make such a decree under Order 1, rule 9 of the Civil Procedure Code, and if the trial Court passes such a decree, the appellate Court is not prohibited by section 99 of the Civil Procedure Code from setting aside that decree, as this section does not prevent the appellate Court from interfering on the ground of non-joinder which affects the jurisdiction of the trial Court." *Ramdoyal* v. *Junmenjoy Coondoo*[2], relied on.

In *Yakub Ibrahim* v. *A. Gulambhas*[3], Desai, J., held as follows :—

" The subject-matter of a partnership suit generally is the severance of the jural relationship and the determination of the mutual rights of the partners. There being mutual agency and mutual obligation to render accounts, the position of parties in a partnership suit is in some particulars different from that of parties in an ordinary suit. Each of the partners in a partnership suit, is really in turn plaintiff and defendant and in both capacities comes before the Court for the adjudication of his rights or liability relatively to the other partners which the Court endeavours to determine by its decree. In such a suit it is well-established that a decree can go either in favour of the plaintiff against the defendant or in favour of any defendant or defendants against any other party or parties to the suit. In a partnership suit all the partners or their legal representatives must be made parties because all the parties necessary for the disposal of the subject-matter of the suit including taking of accounts must be before the Court or the suit will fail. Proper and complete accounts can be taken as between some only of the partners. The necessary corollary of this is that if a necessary party has been omitted and added at a time when the suit against him is barred, the whole suit will be dismissed. The same consideration must apply where in a partnership action by a partner against his other partners, the claim is barred against some of those partners but the bar of limitation is saved against some other or other partners by virtue of any acknowledgment and this is for a simple reason that when accounts are taken in any such suit all the partners would not be before the Court. In such a case there is no estoppel against the partner who has acknowledged his liability. The reason of the rule is that accounts between a number of partners cannot properly be taken by the Court in the absence of any of them. It may be that in a particular case this rule might result in hardship or even defeat a just claim of one partner against another. It may be that the absence of the partner against whom the suit is barred by limitation would not ultimately have made any real difference in the actual result of the accounts. It may also be that on proper taking of accounts that partner might turn out not to be a debtor of the firm or of the other partners but something may be found due to him. But all these considerations cannot override the application of the statute of limitation and after all these statutes of repose are not intended to help those who slumber and sleep over their rights. Therefore, if the plaintiff did not choose to bring his action for nearly four years after the dissolution of the partnership, he has to blame himself if he is not able to get any relief from the Court."

In *Peeran Sahib* v. *Jamaluddin Sahib*[4], the facts were : One *K*, a Muhammadan, was carrying on an indigo business with three other partners. *K* owned a half share and the other half was owned by the other partners. *K* died in 1900 leaving behind his widow, four sons and a daughter *S*. On *K's* death the business of the firm was carried on as before by *K's* eldest son as representing the half share of all the sons of *K* and the representative of the other partners according to directions contained in *K's* will. The plaintiffs who were the son and grandaughter of *S* filed a suit for dissolution of partnership and accounts on the allegation that the partnership business was carried on by the manager chosen from the representatives of the two main shares and the said managers were managing the affairs of the company for themselves and for the benefit of all the heirs of *K* and the partners including the heirs of such of those who died subsequently. It was held

(i) On the evidence that the plaintiffs had failed to prove that they or persons through who, they claimed were either taken as partners in the business carried on subsequent to *K's* death or that there was any implied agreement to carry on the business in partnership by taking in the legal representatives of a deceased partner.

(ii) Under section 42, Partnership Act, the partnership was dissolved on the death of *K*, there being absolutely no evidence on record for implying a contract between the parties to exclude the statutory termination of the partnership under section 42.

1. (1929) 58 M.L.J. 613.
2. (1887) I.L.R. 14 Cal. 791.
3. A.I.R. 1958 Bom. 51.
4. A.I.R. 1958 Andh. Pra. 48.

(iii) That the plaintiffs' claim could not be sustained on the basis of section 37, Partnership Act. The suit was not to enforce rights under section 37, for the plaintiffs did not claim as representatives of a deceased partner for recovery of the profits earned by the partner's assets being utilised by the surviving partners but for accounts as partners of the firm.

(iv) A suit by the heirs or legal representatives of a deceased partner for accounts and a share of profits under section 37, Partnership Act, would be governed by Article 106 and not by the residuary Article 120 of the Limitation Act and time would commence to run from the date of death of the partner on which date the partnership must be deemed to be dissolved, in the absence of any agreement for taking in the legal representatives of the deceased partner as partners.

Article 120 is a residuary article and it can be invoked only in a case where there is no specific article governing a particular relief.

To sum up, as against this current of decisions, the decision in *Jamna Kunwar* v. *Kunj Behari*[1] would not prevail for establishing the position taken by Mr. Viraraghavan.

The learned advocate Mr. Veeraraghavan advances another line of argument, based on the decision in *Nilmadhab* v. *Nirada Sundari*[2], as follows: A suit brought on the death of a partner by his legal representative for accounts of the partnership business since such partner's death, is not governed by Article 106 of the Limitation Act, inasmuch as the right of the legal representative is not to a share of the profits of a dissolved partnership within the meaning of Article 106, but a right accruing to him by subsequent dealing with the assets belonging to the deceased partner. Where on the death of a partner, the partnership business is continued by the remaining partners, the representative of the deceased partner is entitled to the share of his predecessor-in-interest in the assets and to the profits attributable to the use of that share and he is entitled to have accounts in order to the determination of the profits under section 37 of the Partnership Act as he formerly was so entitled under section 88 of the Indian Trusts Act and as rule of justice, equity and good conscience. This decision undoubtedly supports the stand taken by the learned advocate for the appellant. In this case the old partnership had been taken over with all its assets by the new partnership and all that the plaintiff wants is a return back of the share of the assets taken over by the new partnership and that therefore following the above decision it should be held that the suit is not barred by limitation. The learned advocate also draws my attention to a decision of a like nature in *Nagaranjan* v. *Robert Hotz*[3].

The learned advocate for the respondent Mr. Ramamurthi points out two vital infirmities which prevent us from accepting this line of argument. First of all, the suit itself has not been framed in the manner now sought to be pleaded. On the other hand, the suit is for dissolution of partnership and taking of accounts simpliciter. Secondly, there is a line of decisions which would go against the contention of the learned advocate Mr. Viraraghavan. In *Ahinsa Bibi* v. *Abdul Kader Sahib*[4], as early as 1901 a Bench of this Court held that Article 106 of the Limitation Act would apply. In *Joopoody Sarayya* v. *Lakshmanaswamy*[5], their Lordships of the Privy Council have held that a suit of this nature not brought within three years from the date of death of Bagampiriyal Ammal was barred by Article 106 of the Limitation Act. See also *Peeran Sahib* v. *Jamaluddin Saheb*[6].

The net result of this analysis is that this second appeal is bound to fail and it is dismissed but in the circumstances without costs.

R.M. *Appeal dismissed.*

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1. A.I.R. 1937 All. 502.
2. 45 C.W.N. 1065.
3. A.I.R. 1954 Punj. 278.
4. (1901) I.L.R. 25 Mad. 26.
5. (1913) 25 M.L.J. 128: I.L.R. 36 Mad. 185 (P.C.).
6. A.I.R. 1958 Andh. Pra. 48.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE GANAPATIA PILLAI.

S. M. Syed Haji Abdul Rahiman & Co., Madras .. *Appellant**

v.

C. H. Kizar Mohamed & Co., Madras .. *Respondent.*

Trade Marks Act (V of 1940), section 20—Scope of bar under—'Passing off' action—Nature of evidence and form of decree.

There is a difference between suits to restsrain an infringement of a trade mark and suits to restrain a passing off of goods. While the former class of cases will be governed by the provisions of the Trade Marks Act, section 20 (2) of the Act expressly execludes the application of the Act to actions against any persons passing off goods. In such actions it is not always necessary to prove that the similarity in the marks has actually deceived the buyers. The Court would only find out if an ordinary buyer would not be deceived by the close similarity.

A decree granting an injunction in passng off actions should not be in the form of an absolute prohibition against the defendant but should be more in the nature of a limited prohibition, *viz.*, that the defendant should not use the offending mark or label without taking proper care to distinguish the same from that of the plaintiff.

On appeal against the Judgment and Decree of the Hon'ble Mr. Justice Ramaswami Goundar, dated 3rd December, 1953 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court.

S. T. Srinivasagopalachari, for Appellant.

T. S. Krishnamurthi Ayyar, for Respondent.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This is an appeal against the Judgment and Decree of Ramaswami Goundar, J., in a suit filed on the Original Side of this Court, C.S. No. 223 of 1950, by the respondents, C. H. Kizar Mohamed & Company, in the following circumstances : The plaintiffs are a registered firm of merchants carrying on lunghi business in Madras. The defendants are a firm of merchants carrying on business in Moore Street, Madras. The plaintiffs alleged that their business consisted in the manufacture and sale of a special class of cloth known as lunghi, kylie and sarangs, that their business had been established and had been in existence for over 8 years and their goods have become well-known in many places and territories; that from about the year 1913, the plaintiffs had been using for their goods, a trade mark the outstanding feature of which was a chair printed on a label. A specimen of the label was appended to the plaint and marked as Exhibit A. The plaintiff alleged that their goods with the trade mark of the said description had acquired a special name and fame for the quality and genuineness in the markets throughout India and outside India. It was further alleged by them that they came to know recently that the defendants who are also lunghi merchants trading in Madras were adopting a device or mark for their goods labels with the representation of the chair and practically of the same size as the label used by the plaintiffs. A specimen label used by the defendants was appended to the plaint, marked as Exhibit B. The plaintiffs charge that such user by the defendants of the mark resembling the trade mark used by the plaintiffs has the effect of passing off the defendants's goods as goods manufactured by the plaintiffs which have come to be known in the market popularly as Karzi or chair brand goods.. The plaintiffs, therefore, had to seek the protection of the Court to prevent such passing off. The plaintiffs prayed that the defendants be restrained by a permanent injunction from using the said trade mark in future for their goods, that the defendants be directed to surrender all the printed labels with such marks to the plaintiffs; that the defendants be directed to render an account of all the sales effected by the defendants of their goods with such trade marks from the date when they commenced to use the mark in question and that an account be taken of the profits made by the defendants on

*O.S. Appeal No. 96 of 1954. 11th December, 1958.

such sales, and defendants be directed to pay such amount as may be found due on the taking of such accounts.

Several pleas were taken by the defendants in their written statement. They pleaded that one of the several trade marks used by them was the table brand mark which was in use ever since 1928 ; that there was practically nothing in common between the plaintiffs' trade mark and the defendants' table brand mark which can in any sense be regarded as calculated to deceive the unwary public into believing that the goods of the one are really the goods of the other. They pointed out that there was great dissimilarity in device, size, get-up, colour, name, lettering and other details. There was, therefore, no chance of any deception resulting in the passing off of the goods. A legal plea was also taken, namely, that the suit was barred under section 20 of the Trade Marks Act, 1940.

The following issues were framed :

(1) Whether the plaintiffs are entitled to the right of trade mark claimed by them ?

(2) If so, whether the defendants have infringed the plaintiffs' rights; and what are the reliefs the plaintiffs are entitled to?

(3) Whether the suit is not maintainable under section 20 of the Trade Marks Act (V of 1940) ?

The learned Judge Ramaswami Goundar, J., who tried the suit held that if the defendants were allowed to retain the chair in their label it would enable them to pass off their goods as those of the plaintiffs, and, therefore, they should be directed to remove the chair from their label. The learned Judge found that the plaintiffs' label and the defendants' label were more or less of the same colour and size, and both of them contained the device of a chair, the only difference being that there was in addition a table in the defendants label. He, therefore, granted an injunction restraining the defendants from using the label or trade mark with the device of the chair but observed that there will be no objection for their using it without the chair. The rest of the plaintiffs' claim was dismissed. The defendants are the appellants before us.

Mr. Srinivasagopalachariar, the learned counsel for the defendants-appellants argued that there is a fundamental difference between an action for infringement of a registered trade mark and an action for passing off the goods of the defendants as the goods of the plaintiffs ; and that the learned Judge has not borne in mind this distinction in deciding the case. We do not agree that the judgment of the learned Judge is vitiated by not adverting to this distinction. The learned Judge has clearly dealt with the case as an action for passing off. In the plaint it was unequivocally stated that the user by the defendants with the label closely resembling the label of the plaintiffs had the effect of passing off the defendants' goods as the goods manufactured by the plaintiffs. The learned Judge has decided the case on that footing. It is, of course, not necessary that there should be actual evidence that the similarity had deceived the buyers. Sometimes when a plaintiff comes to Court expeditiously before any perceptible loss has been sustained it will not be possible to adduce evidence of actual deception. Then it would be for the Court to find out if an ordinary buyer would or would not be taken in by the close similarity between the trade marks adopted by the two contesting parties.

We have looked at the two labels and we entirely agree with the learned trial Judge that there is similarly between the two to such an extent as would lead an ordinary buyer not to make a difference between the two. As the learned Judge has pointed out, there will be no opportunity for the purchaser to have these labels side by side and then to make a decision himself.

Mr. Srinivasagopalachariar, next contended that the onus was wrongly thrown on the defendants to establish that they had been using the impugned label from a very long time without any objection on the part of the plaintiffs. But we do not think so. The plaintiffs' case was simply this : that they were using this particular label with the device of a chair for a considerably long period and that only recently the defendants had begun to use a label which very closely resumbles their own.

It is the defendants who pleaded that they had been using exactly similar labels from a long time and, therefore, it is incumbent on them to prove their case. There is one circumstance which is clinching, namely, that if the defendants had been using a similar label from a long time and they found that the plaintiffs were using a label closely resembling theirs, they would have taken proceedings to prevent the plaintiffs from using the label and the very fact that they never made any such complaint certainly inclines one to accept the version of the plaintiffs. The evidence on either side is very meagre but it cannot be said that the learned Judge's finding is not supported by the evidence on record. We have no hesitation in agreeing with the learned Judge's conclusion that by the use of the label closely resembling the label of the plaintiffs in size, colour and design, the defendants were passing off their goods as those of the plaintiffs. The plaintiffs are entitled to the relief of injunction restraining the defendants from so doing.

Mr. Srinivasagopalachariar complained that the learned Judge did not give a definite finding on one of the issues based on section 20 of the Trade Marks Act. Evidently, this was not pressed before the learned Judge, but, in any event, we find that there is no substance in this plea. Section 20 of the Trade Marks Act, 1940, runs thus:

"(1) No person shall be entitled to institute any proceeding to prevent, or to recover damages for, the infringement of an unregistered trade mark unless such trade mark has been continuously in use since before the 25th day of February, 1937, by such person or by a predecessor in title of his and unless an application for its registration, made within five years from the commencement of this Act, has been refused ; and the Registrar shall, on application in the prescribed manner, grant a certificate that such application has been refused.

(2) Nothing in this Act shall be deemed to affect rights of action against any person for passing off goods as the goods of another person or the remedies in respect thereof."

Having regard to sub-section (2) which expressly saves the rights of action against any person passing off goods, we fail to see how the suit is barred by the provisions of this section. In our opinion, section 20 in no way bars the present suit. This objection must be overruled.

Finally Mr. Srinivasagopalachariar took exception to the form of the decree. The decree runs thus :

" (1) That S. M. Syed Haji Abdul Rahiman & Co., the defendants herein, their servants and agents be and are hereby restrained by a perpetual injunction from using the label or trade mark Exhibit P-2 or Exhibit D-1 (annexed hereto) with the device of the chair, and that there be no objection to their using the said device without the chair."

Learned counsel drew our attention to the ruling reported in *Munnalal Serowjee* v. *Jawala Prasad*[1] and *Shanmuga Nadar* v. *Shanmugavel Nadar*[2], and the observations occurring in the judgment of the learned Judge who decided *Lissen, Ltd.* v. *Harley*[3]. In the last case an order was passed restraining the defendants from selling or offering for sale any batteries under a label containing the word ' Lissen ' or under any label calculated to deceive, without clearly distinguishing the said batteries from the batteries of the plaintiff. In *Shanmuga Nadar* v. *Shammugavel Nadar*[2], Patanjali Sastri, J., (as he then was) granted an injunction in the following terms :

" An injunction restraining the appellant and his father from using the term 'Shanmugam' in connection or association with beedies as a descriptive term thereof or from using any trade name or trade mark in which the term ' Shanmugam ' occurs or from carrying on business in the Ambasamudram Taluk in the firm name in which the word ' Shanmugam ' occurs without taking reasonable precaution to clearly distinguish the business carried on or beedies manufactured or sold by the defendants from the business carried on and the beedies manufactured by the plaintiff."

Fletcher, J., in the *Calcutta case* (*Munnalal Serowjee* v. *Jawala Prasad*[1]), (a similar case) granted an injunction in the following terms :

" An injunction restraining the defendants from selling or offering for sale ghee not prepared or manufactured by the plaintiff in canisters having embossed thereon a flower on a stem with leaves (the flower being in the shape of an ellipse with an indented circumference) without clearly distinguishing such ghee from the plaintiff's ghee."

1. (1908) I.L.R. 35 Cal. 311.
2. (1940) 1 M.L.J. 749.
3. (1929) 46 R.P.C. 10.

Johnston v. *Orr Ewing*[1] is a case which resembles ours substantially. There the resemblance was in respect of the devices used in the label to indicate the goods of the contesting parties. In that case there was no evidence of actual deception ; but the Court found that there was a possibility of such deception. In the result an injunction was granted to the aggrieved plaintiff in the following manner :

" To restrain the defendants, their servants, workmen and agents, from affixing or causing to be affixed to any Turkey red yarn not dyed by the plaintiffs, the ticket marked B,and from using two elephants on any ticket used on Turkey red yarn, without clearly distinguishing such ticket from the plaintiffs' ticket mentioned in the pleadings, being the Exhibit marked A referred to in the said depositions, so as to represent or induce the belief that any of the said yarn was dyed by the plaintiffs."

Mr. Krishnamurthi Aiyar who appeared for the respondents did not seriously take exception to the injunction being passed in such a manner. We therefore modify the injunction embodied in the decree of Ramaswami Goundar, J., and instead of the said injunction we grant the following injunction :

" That S. M. Syed Haji Abdul Rahiman & Co., the defendants herein, their servants and agents be and are hereby restrained by perpetual injunction from using the label or trade mark Exhibit P-2 with the device of the chair without clearly distinguishing such label from the label used by the plaintiffs marked Exhibit P-1 so as to induce the belief that the lunghis sold under the said trade mark are the lunghis manufactured by the plaintiffs".

Except for this modification of the decree, the appeal is dismissed. No costs.

R.M. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.]

PRESENT :—MR. JUSTICE RAJAGOPALAN.

M. Ramiza Bi Saheb .. *Petitioner**

v.

The Income-tax Officer, Circle IV, Madras .. *Respondent.*

Income-tax Act (XI of 1922), *section* 16 (3) (*a*)—*Minor son admitted to the benefits of partnership of which mother is a partner—Income of minor cannot be included in the mother's income for purposes of assessment—Section* 31 (4)—*Revised orders of assessment—Notice to the assessee.*

Under section 16 (3) (*a*) of the Income-tax Act the share income of the minor son who has been admitted to the benefits of the partnership should not be included in the share income of the mother from the firm of which she is a partner, for the purpose of assessment.

Under section 31 (4) of the Act when the revised orders of assessment are issued bythe appellate authority the original orders of assessment ceased to be operative. The liability of the assessee has to be determined only under the revised orders of assessment. It was therefore not necessary for the assessee to challenge the validity of the original orders of assessment in any proceedings. The petitioner (mother) had a right to contend and establish if she could, in the proceedings to revise the original orders of assessment that section 16 (3) (*a*) did not authorise the inclusion of the share income of the minor son in her share income for assessment.

In the circumstances of the case failure to give notice about the revision of assessment vitiated the exercise of jurisdiction.

Commissioner of Income-tax v. *Sodra Devi*, (1958) S.C.J. 1 : (1958) 1 M.L.J. (S.C.) 1 : (1958) 1 An.W.R. (S.C.) 1 : (1957) 32 I.T.R. 615, followed.

Petition praying that in the circumstances stated therein and in the affidavit filed with W.P. No. 1220 of 1956 on the file of the High Court, the High Court will be pleased to issue writs of *certiorari* calling for the records and quash the orders of the Income-tax Officer, Circle IV, Madras, in G.I. No. 171-*r*/54-55, dated 4th May, 1956, for the assessment year 1954-55, G.I. No. 171-*r*/55-56, dated 28th June, 1956, for the assessment year 1955-56 and G.I. No. 171-*r*/53-54, dated 4th May, 1956, for the assessment year 1953-54 respectively.

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1. (1882) L.R. 7 A. C. 219.

*W.P. Nos. 1217, 1218 and 1220 of 1956. 2nd January, 1959. (12th Pausa, 1880 Saka).

T. V. Viswanatha Iyer and *S. Narayanaswami*, for Petitioner in all the petitions.

C. S. Rama Rao Sahib, Special Counsel for Income-tax on behalf of the Respondent in all the petitions.

The Court made the following

ORDER.—Ahmed Batcha, the husband of the petitioner, and his son Abdul Rahman traded in partnership. The name of the firm was Malang Trading Company. After the death of these two, the petitioner and Qumarunnissa, the widow of Abdur Rahman, entered into a partnership, evidenced by the partnership deed dated 6th March, 1952, and continued the business under the same name. The petitioner's minor son Hayat and Qumarunnissa's minor son Ahmed Batcha were admitted to the benefits of the partnership, each of the minors was allotted a four annas share. The petitioner had a seven annas share, and Qumarunnissa, a one anna share.

For the assessment years 1953-54, 1954-55 and 1955-56 the Income-tax Officer refused to grant registration under section 26-A to Malang Trading Company, and he treated it as an association of persons for purposes of assessment to tax. The assessees appealed to the Assistant Commissioner. He granted registration and directed the Income-tax Officer to make the consequential revisions of the assessments he had already completed.

Meanwhile, the Income-tax Officer had completed the proceedings to assess the petitioner, and in each of three years 1953-54, 1954-55 and 1955-56 the petitioner was assessed in the status of an individual. The assessment proceedings for 1953-54, 1954-55 and 1955-56 were completed respectively on 21st July, 1953, 28th July, 1955 and 28th October, 1955. In those proceedings the share income of her minor son Hayat from Malang Trading Company was taken into account for the purpose of determining the rate at which the tax had to be assessed on the petitioner's income. In the assessment years 1954-55 and 1955-56 the petitioner was treated as having no assessable income. The main source of income was the profits of the Malang Trading Company, and that, it should be remembered, was separately assessed as constituting an association of persons. Against these orders of assessment the petitioner did not prefer any appeals, but, then it should be remembered there was no demand, at least for 1954-55 and 1955-56.

It was the partners of Malang Trading Company that appealed to the Assistant Commissioner against the orders of the Income-tax Officer treating them as an association of persons and refusing the registration they had sought under section 26-A of the Act. The appeals in respect of the assessment for the years 1953-54 and 1954-55 were disposed of by the Assistant Commissioner on 9th January, 1956, and the appeal in relation to the 1955-56 assessment was disposed of on 28th April, 1956. The result was that Malang Trading Company had to be assessed as a registered firm. That necessitated the revision of the assessment of the petitioner's income in the three years in question, taking into account the share of the profits of the registered firm.

On 4th May, 1956, the Income-tax Officer issued revised orders of assessment for the assessment years 1953-54 and 1954-55. On 28th June, 1956, he revised the assessment for the assessment year 1955-56. In all the three years the share income of the petitioner's minor son Hayat from the profits of the registered firm Malang Trading Company was included in the petitioner's income under the provisions of section 16 (3) (*a*) of the Income-tax Act. No notice was given to the petitioner before the assessments were revised, and she was given no opportunity of making any representations at that stage.

The petitioner applied under Article 226 of the Constitution for the issue of writs of *certiorari* to set aside the revised orders of assessment dated 4th May, 1956 and 28th June, 1956. W.P. No. 1217 of 1956 related to the assessment year 1954-55, W.P. No. 1218 of 1956 to the assessment year 1955-56 and W.P. No. 1220 of 1956, to the assessment year 1953-54.

The validity of the revised orders of assessment was challenged by the learned counsel for the petitioner on two grounds: (1) the revision was without notice to the petitioner and without giving her an opportunity to show cause against the revision on the lines ultimately adopted by the Income-tax Officer; (2) the Income-tax Officer had no jurisdiction to levy a tax on the petitioner on the share income of her minor son Hayat, though Hayat had been admitted to the benefits of the partnership.

The second ground is certainly well taken. The question at issue, whether under section 16 (3) (*a*) the share income of a minor son from the partnership of which the mother also was a partner could be included for the purpose of assessment in the mother's income, is concluded by the decision of the Supreme Court in *Commissioner of Income-tax* v. *Sodra Devi*[1]. The Supreme Court held :

"In computing the total income of a mother, the income of her child arising from the admission of the minor to the benefits of the partnership in a firm of which the mother is a partner cannot be included under section 16 (3) (*a*) (ii)."

In my opinion, in the circumstances of this case, the failure to give an opportunity to the petitioner to be heard before the assessments were revised vitiated the exercise of the jurisdiction the Income-tax Officer had to revise the assessments. The Income-tax Officer had jurisdiction to revise the assessments in the case of the petitioner. In fact he was bound to do so under section 31 (4) of the Act, to comply with the directions given by the Appellate Authority in the appeals preferred by the Malang Trading Company. No doubt no specific provision is made in section 31 (4) for the issue of a notice to the assessee before the assessments are revised. But by about the middle of 1956, when the Income-tax Officer undertook the revision of assessments, the question had been raised whether section 16 (3) (*a*) authorised the inclusion in the mother's income, for the purpose of assessment, the share income of the partnership profits of her minor child. That question was finally concluded by the decision of the Supreme Court rendered on 17th May, 1957 in *Commissioner of Income-tax* v. *Sodra Devi*[1]. Whether the Income-tax Officer, who certainly could not have had the benefit of the ruling of the Supreme Court given in 1957 when he completed the revision in 1956, would have taken the same view is not the question. The petitioner should, I think, in the circumstances of this case have been given an opportunity to show cause against the inclusion of her minor son's income in hers for the purpose of assessment.

It is true, as the learned counsel for the Department pointed out, that the petitioner had a statutory remedy open to her. She could have invoked the revisional jurisdiction vested in the Commissioner and she did not. That, however, in the circumstances of this case, may not be sufficient to refuse relief to the petitioner, if she is otherwise entitled to it, that is, if she is otherwise entitled to the issue of writs of *certiorari, ex debito justitiae*. The question is really one of jurisdiction. In view of the decision of the Supreme Court in *Commissioner of Income-tax* v. *Sodra Devi*[1], it will have to be held that the Income-tax Officer had no jurisdiction to include in the petitioner's income the share income of her minor son, in the sense the law did not authorise such an inclusion.

The learned counsel for the Department urged that the question of the petitioner's liability to have her minor son's share income included in hers for the purpose of assessment was concluded by the original orders of assessment dated 21st July, 1953, 28th July, 1955 and 28th October, 1955 respectively, and that even had an opportunity been given to the petitioner to show cause against the revision of assessment in compliance with the directions given by the Appellate Assistant Commissioner under section 31 (4) of the Act, it would not have been open to the petitioner to challenge in the subsequent proceedings the correctness or otherwise of the decision of the Income-tax Officer in the original orders of assessment, that the petitioner was liable under section 16 (3) (*a*) to be taxed on the share income of her minor son

1. (1958) S.C.J. 1 : (1958) 1 M.L.J. (S.C.) 1 : (1958) 1 An.W.R. (S.C.) 1 : (1957) 32 I.T.R. 615.

also. The same argument was presented in a slightly different aspect. The learned counsel for the Department urged that the basis of the original orders of assessment stood and became final. There was only a substitution of figures which had to be done in compliance with the directions given under section 31 (4) of the Act.

I am unable to accept the contention of the learned counsel for the Department, that it was only a case of substitution of figures. When the revised orders of assessment were issued the original orders of assessment ceased to be operative. The liability of the petitioner has to be determined only under the revised orders of assessment issued in 1956. It was not therefore necessary for the petitioner thereafter to challenge the validity of the original orders of assessment in any appropriate proceedings. The principle of *res judicata* can have no application either. The learned counsel for the assessee was, in my opinion, well-founded in his contention, that the petitioner had a right to contend and establish, if she could, in the proceedings to revise the original assessments that section 16 (3) (*a*) did not authorise the Income-tax Officer to include in her income the share income of her minor son. That the share income of the minor son was taken into account for the purposes of computation in the original assessment proceedings can therefore be no bar to the investigaton of the question, whether, when the Income-tax Officer revised the orders and issued in effect fresh orders of assessment, he had jurisdiction to include in the petitioner's assessable income the share income of her minor son, and whether section 16 (3) (*a*) conferred the jurisdiction on him to order such inclusion.

Neither of the objections urged by the learned counsel for the Department is therefore a bar to the exercise of discretion in favour of the petitioner to grant her the relief to which she is entitled, as I have pointed out earlier, *ex debito justitiae.*

As I have already pointed out the petitioner's right to have her minor son's income from the partnership excluded from hers is concluded by *Commissioner of Income-tax* v. *Sodra Devi*[1].

The rule *nisi* in each of these cases is made absolute, and the revised orders of assessment of the Income-tax Officer dated 4th May, 1956 and 28th June, 1956, will stand set aside by the issue of writs of *certiorari.* That in effect, means the Income-tax Officer will have to carry out afresh the statutory duty imposed upon him by section 31 (4) of the Act to revise the assessment of the petitioner's income for the three years in question.

The petitioner will be entitled to her costs in one petition, W.P. No. 1217 of 1956. Counsel's fee Rs. 250. There will be no order as to costs in the other two writ petitions.

V.S. ——— *Rule nisi made absolute.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMACHANDRA AYYAR.

P. Karuppannan and another .. *Petitioners**

v.

Sadaya Maistry and others .. *Respondents.*

Madras Court-fees and Suits Valuation Act (XIV of 1955), *sections* 41 (2) *and* 50—*Suit to set aside a summary decision—Court-fee payable.*

Section 41 (2) of the Madras Court-Fees and Suits Valuation Act provides for valuation of suits to set aside a summary decision of a civil or revenue Court. Section 50 is in the nature of a residuary section providing for cases not otherwise provided for in the Act. In suits to set aside a summary order it is not correct to say that the subject-matter of the suit is the summary order itself. Such suits contemplate the adjudication of title and are not mere appeals from the summary orders. Hence it cannot be said as a rule that such suits are incapable of valuation. Under the new Madras Court-fees Act such suits are divided into two categories—those capable of valuation and those which are not so

1. (1958) S.C.J. 1 : (1958) 1 M.L.J. 1 (S.C.) : (1958) 1 An.W.R. (S.C.): 1 (1957) 32 I.T.R. 615.

*C.R.P. No. 1925 of 1958. 31st July, 1959. (9th Sravana, 1881—Saka).

capable. Incidental reliefs such as injunction or possession will not alter the character of the suit so long as the subject-matter of the suit has a market value. The subject-matter of such suits should be held to be what the summary orders were concerned with, *viz.*, the immoveable property and Court-fee has to be paid on the proportionate market-value as laid down in section 41 (2) of the Act.

Petition under section 115 of Act V of 1908, praying the High Court to revise the Order of the Court of Subordinate Judge of Nilgiris, at Ootacamund, dated 13th October, 1958 and made in O.S. No. 10 of 1958.

Messrs. Pais, Lobo and *Alvares*, for Petitioners.

The Government Pleader (*K. Veeraswami*) and *K. Vaitheeswaran*, for Respondents

The Court delivered the following

JUDGMENT.—This revision petition is directed against the finding on issue No. 12 in O.S. No. 10 of 1958, on the file of the Sub-Court, Nilgiris, Ootacamund, relating to Court-fee payable on the plaint.

The plaintiffs are the petitioners. They obtained a decree for possession of certain properties in O.S. No. 81 of 1951 against the first respondent, but when they proceeded to execute the decree, they were obstructed by respondents 2 to 4. Thereupon, they filed E.A. No. 149 of 1956 under Order 21, rule 99, Civil Procedure Code, for removal of obstruction. That application was dismissed. O.S. No. 10 of 1958 was instituted to set aside the order passed in E.A. No. 149 of 1956. The petitioners valued the suit as if the subject-matter had no market-value, and fixed Rs. 400 for the purpose of jurisdiction and paid a Court-fee of Rs. 30 under section 50 (3) of the Madras Court-fees Act. The suit was contested by the respondents, and one of the issues raised related to the Court-fee payable on the plaint. The learned Subordinate Judge held that section 41 (2) of the Madras Court-fees Act, 1955, would apply to the case, and that the Petitioners should value the relief on one-fourth of the market-value of the property, forming the subject-matter of the suit, that is, the property in respect of which a decree for possession was passed in O.S. No. 81 of 1951. He, accordingly, directed the Petitioners to make necessary amendments to the plaint and pay the requisite Court-fee. The Petitioners have filed this Civil Revision Petition, questioning the correctness of the order of the lower Court.

Section 41 (2) of the Court-Fees Act states :—

"In a suit to set aside any other summary decision or order of a Civil or Revenue Court, if the subject-matter of the suit has a market value, fee shall be computed on one-fourth of such value, and in other cases, fee shall be payable at the rates specified in section 50 ".

Section 50, which is in the nature of residuary section, provides for suits not otherwise provided for in the Act. That prescribes a Court-fee of Rs. 30 if the value of the subject-matter were Rs. 5,000 or below.

The learned counsel for the Petitioners contended that the suit does not relate to any property but is concerned only with the setting aside of his summary order passed in E.A. No. 149 of 1956, and that the subject-matter of the suit should be held to be the summary order itself, which could have no market-value, and that, therefore, the Court-fee payable was only under section 50. In support of that contention, reference was made to the principle established in *Phul Kumari* v. *Ghanshyam Misra*[1]. In that case, defeated claimant in execution proceedings filed a suit for declaration of the rights to the property and for an injunction to restrain the other party from executing the decree. The Privy Council held that the suit was in essence one to review the summary decisions in the Claim Petition, and that Article 17 (1) of Schedule II of the Court-fees Act of 1870 would apply to the case. Under the Court-fees Act (VII of 1870) it had been consistently held that although a suit was for the purpose of setting aside a summary decision and also for incidental reliefs like injunction, possession, etc., the suit was substantially one for setting aside the summary order and would fall under Article 17 (1) of Schedule II of the Court-fees Act of 1870, and the fee chargeable would be only that mentioned therein. Vide *Sakharam Khulkarni* v. *Govind Babaji*[2], *Udai Chand Lal* v. *Firm Pannalal Champalal*[3] and *Kalliani Kutti* v. *Kunhilakshmi*[4]. Under that provision, a fixed Court-fee was payable in respect of suits

1. (1908) I.L.R. 35 Cal. 202.
2. (1884) I.L.R. 9 Bom. 20.
3. A.I.R. 1941 Pat. 174.
4. (1947) 1 M.L.J. 1.

for altering or setting aside a summary order. The decision referred to accepted the principle that where the substantial relief was to set aside the summary order, the fact that incidental reliefs were prayed for could not alter the nature of the suit and that the Court-fee should be paid under Article 17 (1) of Schedule II. Those decisions did not proceed on the basis that a suit to set aside a summary decision was necessarily incapable of valuation but that there was a specific provision in the enactment prescribing a fixed fee for such suits. But under the Madras Court-fees Act of 1955 suits to set aside summary orders are divided into two categories, those in which the subject-matter is capable of valuation and those in which it is not so capable. The principle that where a suit is substantially one to set aside a summary order, the inclusion in the suit of incidental reliefs like injunction, possession, etc., will not alter the character of the suit, would also apply to cases under the new enactment. But even so, the question would still be as to whether the subject-matter of a particular suit to set aside a summary order has a market value.

The contention that a summary order itself should be deemed to be the subject-matter of the suit cannot be accepted. Both under Order 21, rule 63 and Order 21, rule 103, Civil Procedure Code, it is not propriety of the preceding summary order that would be in question. It is well settled that an application under Order 21, rule 58, is concerned only with the question of possession and those under Order 21, rules 99 and 101, with the question whether the obstructor was in possession in his own right. The suits to contest those orders which are summary in their nature contemplate the adjudication of title. They are not mere appeals from the summary orders though for certain purposes they have been construed to be a continuation of the earlier proceedings. Under Order 21, rule 63, Civil Procedure Code, the plaintiff will have to establish the right which he claims in the property in dispute. Under Order 21, rule 103, he will have to establish the right which he claims to the present possession of the property. Thus, in either case, the question of title to the property would necessarily have to be adjudicated.

In *Kaleswara Mills, Ltd.* v. *Govindaswami Naicker*[1], it was held that a suit under Order 21, rule 103, was not one for mere determination of the question of possession of the parties concerned, but the establishment of the right or title by which the plaintiff claimed to the present possession of the property. It cannot, therefore, be said that the subject-matter of the suits are the summary orders themselves ; it would be more appropriate to state that the subject-matter of the suit was the title to the property which was the subject-matter of the claim, obstruction or re-delivery proceedings, as the adjudication of title to that property would be involved in the suits. According to the Concise Oxford Dictionary, the word 'subject' means 'theme, discussion or representation or matter to be treated or dealt with.' Therefore, the subject-matter of a suit would mean a matter to be treated or dealt with in the suit. It cannot be disputed that the main matter to be dealt with in the suit (be it under Order 21, rule 63 or Order 21, rule 103) is title to the property which was the subject of the claim or obstruction proceedings. It would follow that the subject-matter of such suits would be the property and not the order. In *Krishnaswami Naidu* v. *Somasundaram Chettiar*[2], question arose as to the proper valuation of a suit under section 283 corresponding to Order 21, rule 63. It was held that the value of the subject-matter of the suit should be taken to be the amount for which the attachment was made. It is implicit from that decision that the subject-matter would be capable of valuation. In *Sankarachariar* v. *Lakshmanan Chettiar*[3], a question arose as to the valuation for the purposes of jurisdiction of a suit to set aside a summary order concerning immoveable property. Section 14 of the Madras Civil Courts Act provided for the valuation of suits, the subject-matter of which was land, house or garden. It was held that a suit under Order 21, rule 63, to set aside a summary order would come within that section and the subject-matter of the suit should be held to be what the summary order was concerned with, *viz.*, the immoveable property. I am of opinion that the interpretation of the words 'subject-matter' in that decision would be appli-

1. (1945) 2 M.L.J. 403.
2. (1907) 17 M.L.J. 95 : I.L.R. 30 Mad. 335.
3. (1949) 1 M.L.J. 195.

cable to section 41 (2) of the Court-fees Act as well. In the instant case, the subject-matter of the suit would be the property in respect of which delivery was sought but refused. That property is capable of valuation and has to be valued for the purpose of Court-fee under section 41 (2) on one-fourth its market-value.

The order of the lower Court is, therefore, correct. This Civil Revision Petition fails and is dismissed. There will be no order as to costs.

R.M. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBRAHMANYAM.

S.T. Pankajammal .. *Appellant**

v.

S. Sambandamurthi Mudaliar and others .. *Respondents.*

Civil Procedure Code (V of 1908), section 73 (1) and Limitation Act (IX of 1908), Article 62—Limitation for suits claiming rateable distribution—Time—How computed.

Under Article 62 of the Limitation Act the time from which limitation runs for a suit against a defendant claiming rateable distribution under section 73 (1) of the Civil Procedure Code is the time when the defendant received the money. For purposes of Article 62 of the Limitation Act the defendant must be deemed to have received the money on the date of confirmation of the sale in cases where the defendant himself purchases and sets-off the sale price against his decree.

Appeal against the Decree of the District Court of Chingleput in Appeal Suit No. 166 of 1956, preferred against the Decree of the Court of the District Munsif of Kancheepuram in Original Suit No. 63 of 1954.

K. S. Desikan and *K. Raman*, for Appellant.

A. Narasimhachari and *A. N. Rajagopalan*, for Respondents.

The Court delivered the following

JUDGMENT.—The dispute is between decree-holders who obtained decrees against the same judgment-debtor. The plaintiffs obtained a decree for Rs. 640-12-9 in S. C. No. 874 of 1930 on the file of the District Munsif's Court, Kancheepuram. The defendant obtained a decree against the same judgment-debtor in S.C. No. 179 of 1932 on the file of the Subordinate Judge, Chingleput. The defendant filed E.P. No. 270 of 1946 on 16th December, 1946, for attachment and sale of the judgment-debtor's properties in execution of her (the defendant's) decree. The plaintiffs filed E.P. No. 166 of 1946 on 6th March, 1956, for attachment and sale of the same properties. The properties were sold on 21st March, 1949, in the execution petition filed by the defendant. Leave to bid and set-off the decree amount had been granted to the defendant. The sale price was Rs. 2,005. Since it was less than the amount due to the defendant, set-off was allowed as to the whole of the price. The sale was confirmed on 17th July, 1952 and part satisfaction of the defendant's decree was recorded that day. The E.P. namely E.P. No. 166 of 1946 filed by the plaintiffs was dismissed on 12th December, 1952, on the ground that the properties had been sold in the defendant's execution petition. The plaintiffs applied that the defendant be compelled to bring into Court money sufficient to satisfy the plaintiff's claim for rateable distribution unde section 73, Civil Procedure Code. That application was dismissed. Consequently, the plaintiffs instituted the suit, which has given rise to this second appeal, praying for recovery of the money due to be paid to them by way of rateable distribution. The suit was instituted on 2nd March, 1954. The learned District Munsif, who tried the suit, held that the suit was barred by time. The learned District Judge on appeal reversed that finding and, holding that the suit was in time granted the plaintiffs a decree. The point is whether the suit is in time.

That, on the question of limitation, the suit is governed by Article 62 of the Limitation Act is conceded by both parties. Article 62 is in these terms :

*S.A. No. 795 of 1957. 30th July, 1959.
(8th Sravana, 1881 Saka.)

Description of Suit.	Period of limitation.	Time from which period begins to run.
62. For money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use.	Three years	When the money is received.

The time from which limitation begins to run is the time when the defendant received the money. The defendant did not actually receive any money in this case. The price which, if the purchase had been made by a third party, would have been deposited in Court, was set-off by the defendant against the amount due to her on her decree. But permisssion to bid and set-off granted under Order 21, rule 72, is always subject to the provisions of section 73. Therefore, since the plaintiffs were entitled to rateable distribution, the defendant should, before the sale was confirmed, have been directed to bring into Court the money needed to satisfy he plaintiffs' claim under section 73, Civil Procedure Code. That was not done. But that could not affect the plaintiffs' right to rateable distribution; that right had to be enforced by suit. Since the money remained all the time in the defendant's hands, the expressions "money received by the defendant" and "when the money is received" occurring in Columns (1) and (3) of Article 62 of the Limitation Act, should, on the facts of this case, be read as the equivalent respectively of the expressions "money deemed to be received by the defendant" and "when the money is deemed to be received."

The defendant-appellant's learned counsel argues that the money must be deemed to have been received by the defendant on the date of the sale, namely, 21st March, 1949. In support of that proposition learned counsel relies on *Sait Punnamchand* v. *Vijjappu Satyanandam*[1]. The facts in that case were these. The decree-holder in whose execution petition the property was sold had obtained leave to bid and set-off. Under the leave granted to him, he had set-off against the purchase money the decree amount due to him. Later, on the same day, but subsequent to the sale, certain other persons, who had obtained decrees against the judgment-debtor, applied for execution and they claimed rateable distribution out of the money in the hands of the decree-holder in whose petition the property had been sold. It was held that they were not entitled to rateable distribution. The decision turned on the interpretation of the expression "receipt of assets" in section 73 (1) which enacts :

"Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realisation, shall be rateably distributed among all such persons."

It was held in that case that the assets had been received in the executing Court at the time of the sale and set-off and that, since those other decree-holders had not filed an application before the sale, they were not entitled to rateable distribution. But let us suppose that those other decree-holders had filed applications for rateble distribution a day before the date of the sale. In that event, they would have been entitled to rateable distribution notwithstanding that no money (other than poundage) was paid into Court by the decree-holder purchaser. Under section 73, the question of rateable distribution arises only where assets are held by a Court. In case where a decree-holder purchaser sets-off the purchase money against the decree amount due to him, assets are deemed to be held by the Court for the purpose of enabling other decree-holders who have applied for execution before the date of the sale to obtain rateable distribution under section 73 of the Civil Procedure Code. That is to say, for the purpose of section 73 (1), money, which is in the hands of the decree-holder purchaser, he having set-off the purchase money against the decree amount payable to him, is deemed to have been received by the Court and to be held by the Court. The point for decision in *Sait Punnamchand* v. *Vijippu*

1. (1933) 65 M.L.J. 569 : I.L.R. 57 Mad. 38.

Satyanandam[1], related to the construction of the expression "receipt of assets" in section 73, that is to say, receipt of assets by the Court. That decision is not relevant in considering the expression "when the money is received" in Article 62 of the Limitation Act, which deals with the point of time when the money is received or should be deemed to be received not by the Court which sells the property but by the decree-holder who receives the money in satisfaction or part satisfaction of his decree.

Under section 73 (2), a person entitled to rateable distribution, but not granted rateable distribution in execution, may institute a suit to enforce his rights as against a person who is not entitled to receive the sale proceeds and yet is paid the money. In this case, the decree-holder purchaser not being entitled to receive the money, which was liable to be paid to the plaintiffs, the suit is filed by them to recover the money. In a case where a third party purchaser deposits the purchase money, the money would not be paid to the decree-holder at whose instance the property is sold until after confirmation of the sale ; that is to say, there would be no receipt of money by a person in the position of the defendant in this case until the date of confirmation of the sale. The correct order to pass in the defendant's execution petition was to call on her to bring to Court the money payable to the plaintiffs under section 73, Civil Procedure Code and to confirm the sale after she deposited the money, or, if she failed to deposit the money within the time allowed, to set aside the sale. In the circumstances, the payment to her of the money which was payable to the plaintiffs could be said to have occurred only on the date on which the sale was confirmed without her being called upon to deposit, for the benefit of the plaintiffs, the money to which they were entitled under section 73 (1), Civil Procedure Code. I find that, for the purpose of Article 62 of the Limitation Act, the defendant must be held to have received the money on the date of confirmation of the sale, namely, 17th July, 1952, and, since the suit was filed within three years from the date, the suit was in time.

The appellant's learned counsel states that the plaintiffs' E.P. No. 166 of 1946 was barred by time. That point is taken on the basis of the statement made in the plaintiffs' execution petition regarding the result of the earlier proceedings. The plaintiffs state in that execution petition that a petition filed by them on 6th October, 1932, was dismissed, that the next petition filed by them on 25th October, 1935, was returned and that the third petition filed by them on 25th October, 1938, was dismissed after notice. The appellant's learned counsel argues that the petition dated 25th October, 1935, which is said to have been returned cannot be availed of for the purpose of limitation. That argument involves investigation into facts relating to the petition, dated 25th October, 1935. No plea that the respondents' execution petition E.P. No. 166 of 1946 was barred was taken in either of the lower Courts. If the point were taken, the respondents might have been in a position to plead facts showing that the petition was in time. A plea involving investigation of facts cannot be entertained in second appeal.

The second appeal is dismissed. In view of the delay on the part of the plaintiffs in instituting the suit, which has given rise to the second appeal, the plaintiffs will bear their own costs in second appeal. No leave.

R.M. *Appeal dismissed.*

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1. (1933) 65 M.L.J. 569 : I.L.R. 57 Mad. 38.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BASHEER AHMED SAYEED.

South Madras Electric Supply Corporation, Tiruchirapalli .. *Appellant**

v.

T. L. Jagannatha Ayyar and another .. *Respondents.*

Electricity Act (IX of 1910), section 12—Scope—Suit for removal of posts supporting the High Tension Electric Lines fixed without the permission of the owner—Civil Court has jurisdiction to entertain.

Under section 12 of the Electricity Act it is only where support for an aerial line or any stay or strut that has been fixed to secure the aerial line and if any owner or occupier of a building or land of such support, stay or strut shows sufficient cause, the District Magistrate or the Commissioner of Police as the case may be, may by an order in writing direct any such support, stay or strut to be removed or altered. Section 12 (3) empowers the authority concerned when making an order under section 12 (2) to fix the amount of compensation or of annual rent or of both which should be paid by the licensee to the owner or occupier.

Where the suit is one for directing the removal of the posts supporting the High Tension Electrical Lines that have already been fixed without the permission of the owner and without any authorisation from the District Magistrate or the Commissioner of Police, it does not fall within the ambit of the provisions of section 12 of the Act. The civil Court has jurisdiction to decide the dispute.

It is a well-established principle of law that unless there is express ouster of the jurisdiction of the civil Court it must be presumed that ordinarily a civil Court has jurisdiction and in this case the matter in dispute has not been excluded from the purview of the civil Court and there is no provision under the Act for its adjudication.

Case-law discussed.

Appeals against the Order of the Court of the Subordinate Judge of Sivaganga, dated 21st November, 1957 and made in A.S. No. 45 of 1957 (O. S. No. 210 of 1955, Court of the District Munsif of Manamadurai).

K. Parasaran and the Government Pleader *(B. V. Viswanatha Iyer)*, for Appellant.

M. Natesan, for Respondents.

The Court delivered the following

JUDGMENT.—These are two appeals filed against the decision of the learned Subordinate Judge of Sivaganga in A.S. No. 45 of 1957 reversing the decision of the learned District Munsif of Manamadurai in O.S. No. 210 of 1955. The learned District Munsif had held that the suit did not lie in a civil Court and that the proper forum was the District Magistrate and therefore dismissed the suit on the preliminary issue. On appeal by the Plaintiff the learned Subordinate Judge reversed the decision of the District Munsif and held that the civil Court had jurisdiction to try the suit. The two defendants who are aggrieved by the order of the learned Subordinate Judge have preferred these two appeals.

As a matter of fact it has not been made clear as to what subsisting interest the first defendant has in the suit in so far as it has been made clear that the first defendant company was taken over by the State Government and the State Government is now managing the entire question of laying the supply lines and distributing the electric energy. However, both the Electric Company which has gone out of existence and whose place has been taken up by the State Government, and the State Government who stepped into the shoes of the Electric Company have preferred these appeals. C.M.A. No. 49 of 1958 is by the first defendant Electric Company, and C.M.A. No. 147 of 1958 is by the second defendant, the State Government.

The suit that has been preferred by the plaintiff Jagannatha Iyer is for a mandatory injunction directing the defendants to remove the high tension lines

* A.A.O. Nos. 49 and 147 of 1958. 1st May, 1959.
(11th Vaisakha 1881 Saka).

and posts from the plaintiff's property and for recovery of Rs. 990 representing damages for the period from 1st January, 1953 to 1st October, 1955, at the rate of Rs. 360 per year, and for recovery of future damages at the same rate.

The plaintiff's case is that he is the proprietor of Thattangulam village. With a view to supply electric current to Tiruppuvanam town from Manalur, the first defendant company had laid high tension electric lines to a length of one mile across the plaintiff's lands and cocoanut topes in the said village. The planting of posts to support the lines began at the end of 1951. These operations were objected to by the plaintiff, and more especially when the laying of the high tension lines was commenced, but the first defendant's Engineer wrote a letter to the plaintiff dated 12th October, 1951, stating that the arrangement was only a temporary one and that the permanent lines will be laid in a different place without any hindrance to the plaintiff's land. Actually after this letter was written, nothing was done in order to shift the lines from the plaintiff's land. The plaintiff would appear to have demanded the shifting of the lines as undertaken by the first defendant company. Seeing that the first defendant company did not comply with their undertaking and the plaintiff having suffered damage to his property, a notice was sent on 12th August, 1954, on behalf of the plaintiff to the first defendant to remove the lines and posts within 31st December, 1954, or to pay damages by way of rent from 1st January, 1953. The case of the plaintiff was that the action of the first defendant company was trespass against which the plaintiff was entitled to relief. Therefore the plaintiff estimated his loss at Rs. 500 but he was content with claiming only Rs. 360 per year and filed the suit to recover this amount and also for a mandatory injunction against both the defendants to remove the high tension lines and the posts, etc.

Both the defendants would appear to have contended that the high tension lines were finally fixed without any objection on the part of the plaintiff. They pleaded that the plaintiff actually required the line to be laid along the said route expressing that it would be easier for him to obtain energy for the pump-sets he had proposed to erect in his cocoanut gardens. So the plea of estoppel was put forward against the plaint allegations. The further plea of the defendants was that the land had not been affected in any way, nor rendered uncultivable to any extent except at a few negligible points at which the high tension points had been fixed up. Therefore their contention was that the plaintiff had no cause of action. Their further plea was that the plaintiff's claim was obviously misconceived and not sustainable in law and that the civil Court had no jurisdiction to entertain the suit, and the suit was barred under the provisions of the Indian Electricity Act and the Indian Telegraph Act. The question of limitation was also taken up. In any event it was contended on behalf of the defendants that the plaintiff was not entitled to the relief of mandatory injunction and that the damages claimed were excessive. There was a further plea by the second defendant that the statutory notice had not been given when the second defendant was impleaded.

The learned District Munsif framed as many as eight issues and two additional issues as well. The third issue among the ten issues was whether the civil Court had jurisdiction to entertain the suit, and whether the suit as framed against the defendants was not sustainable. This issue was taken up, for trial as a preliminary issue and the learned District Munsif after hearing the parties came to the conclusion that the suit was not maintainable in a civil Court and that the remedy should have been sought before the District Magistrate. Therefore, the learned District Munsif dismissed the suit holding on issues 3 and 7 that the civil Court had no jurisdiction and that the suit was barred by the provisions of the Indian Electricity Act and the Indian Telegraph Act. The learned District Munsif largely relied upon section 12 of the Indian Electricity Act and the decisions in *Dewa Singh* v. *Eazal Dad*[1], *Amar Singh* v. *Khattar E. E. G. Supply Co.*[2] and *Secretary of State* v. *Kameshwar Singh*[3], which according to him supported the contention of the learned counsel

1. A.I.R. 1928 Lah. 562.
2. I.L.R. (1941) Pesh. 73.
3. A.I.R. 1936 Pat. 87.

for the defendants. He also made reference to sections 16 and 17 of the Indian Telegraph Act which authorised the District and Sessions Judge to fix damages. These he referred to by way of analogy, in coming to the conclusion that the civil Court had no jurisdiction and held that the provisions of the Indian Electricity Act and the Indian Telegraph Act were a bar to the institution of the suit in the civil Court.

The plaintiff took up the matter on appeal before the learned Subordinate Judge of Sivaganga and the learned Subordinate Judge in a very well-reasoned judgment has come to the contrary conclusion and has held that the suit was triable by a civil Court and that the civil Court had ample jurisdiction to try the case of the type before him. He has adduced very cogent and convincing reasons for his decision. He therefore allowed the appeal and set aside the decree of the lower Court and remanded the suit for fresh disposal in the light of his observations. Both the first and second defendants aggrieved by this reversal of the decree of the learned District Munsif have preferred these appeals.

Mr. Parasaran appearing on behalf of the 1st defendant contended that the learned Subordinate Judge was wrong in holding that the suit was maintainable in the civil Court. The learned Government Pleader also has contended very vigorously that the suit in question could not be tried by a civil Court and that the only remedy open to the plaintiff was to go before the District Magistrate for compensation as provided for under section 12 of the Electricity Act. I am afraid I cannot agree with the contention of either Mr. Parasaran for the first defendant or the learned Government Pleader on behalf of the State Government. Even a cursory glance of the averments in the plaint would show that the nature of the remedy the plaintiff has sought to enforce against the defendant does not fall within the ambit of section 12 or any sub-section thereof. If section 12 is carefully considered it will be seen that the first sub-section of that section does not at all apply to the facts of the present case. That sub-section provides that a licensee may open, and break up the soil and pavement of any street, railway or tramway. Obviously, the plaintiff is not having any street, railway or tramway. It is his own private land on which he has grown the cocoanut tope. Even so, sub-clauses (*b*), (*c*), (*d*) and (*e*) of sub-section (1) do not have any bearing on the facts of the present case. It is only sub-section (2) of section 12 that has been largely relied upon by the learned counsel for the first defendant and also by the learned Government Pleader. Sub-section (2) of section 12 is to the effect that nothing contained in sub-section (1) shall be deemed to authorise or empower a licensee, without the consent of the local authority or of the owner and occupier concerned as the case may be, to lay down or place any electric supply line or other work in, through or against any building, or on, over or under any land not dedicated to public use whereon, whereover or whereunder any electric supply line or work has not already been lawfully laid down or placed by such licensee. This sub-section clearly excludes the authority or the power of the licensee to do anything on any person's land without his consent, either it be the local authority or the private owner or occupier concerned. But then emphasis is laid on the first and second provisos of this sub-section. A close scrutiny of the language of these two provisos also does not lend support to the contentions raised on behalf of the defendants. Whereas the main part of sub-section (2) relates to the laying down or placing of any electric supply line or other work in, through or against any building, or on, over or under any land not dedicated to public use whereon, whereover or whereunder any electric supply line or work has not already been lawfully laid down or placed by such licensee, the first of the provisos relates only to the support of an aerial line or any stay or strut required for the sole purpose of securing in position any support of an aerial line, and if such support of an aerial line is to be resorted to it may be fixed on any building or land or having been so fixed, may be altered, notwithstanding the objection of the owner or occupier of such building or land, provided the District Magistrate or in a Presidency Town the Commissioner of Police by order in writing so directs. At this stage it must be made clear that in the instant case the licensee has not obtained any order from the District Magistrate or the Commissioner of Police as required by this proviso in order to enable the

licensee to proceed with the fixing of the support of an aerial line or any stay or strut. Therefore two things are clear from a reading of this proviso; the first is that the proviso relates to only fixing of any support of an aerial line or any stay or strut for securing in position any support of an aerial line and the second is that if objection is taken the District Magistrate or the Commissioner as the case may be is authorised to give direction empowering or authorising the licensee to proceed with the fixing of the support, stay or strut. These two things do not obtain in the present case. On the other hand, the case is in simpliciter a case for directing removal of the posts that have already been fixed without the permission of the owner and without any authorisation from the District Magistrate or Commissioner of Police, and this is covered mostly by sub-section (2), the main part thereof. The first proviso has therefore no application to this case. It is only when support for aerial line or any stay or strut that has been fixed to secure the aerial line, the second proviso comes into operation and if any owner or occupier of a building or land of such support, stay or strut shows sufficient cause, the District Magistrate or in a Presidency Town the Commissioner of Police may by an order in writing direct any such support, stay or strut to be removed or altered. Then comes sub-section (3) of section 12. This gives power to the District Magistrate or Commissioner of Police as the case may be, when making an order under sub-section (2), to fix the amount of compensation or of annual rent, or of both, which should in his opinion be paid by the licensee to the owner or occupier. In this case when the District Magistrate has not himself made any order under sub-section (2) and no reference having been made at any stage by the licensee or anybody else who has interest in the carrying on of the High Tension lines over the plaintiff's property, the question of fixing of compensation does not arise. When the order itself has not been made by the District Magistrate or the Commissioner the amount of compensation or annual rent is not called upon to be fixed by this authority. It is only after any such order fixing the compensation has been passed by the District Magistrate or the Police Commissioner that any revision will have to be made by the Provincial Government. That is covered by sub-section (4). Sub-section (5) of section 12 is not relevant for the purposes of this case.

It is contended therefore by the learned Government Pleader and the learned counsel for the first defendant that since the District Magistrate has been authorised to pass orders under sub-section (2) and under sub-section (3) to fix compensation, the remedy is before the District Magistrate and not before the civil Court. True if the matter related to what is referred to in the two provisos there will be substance in the contention that the remedy is to be sought from the District Magistrate and not from the civil Court. But what the plaintiff seeks to enforce is a violation of his right to enjoyment of his land without any interference or hindrance from any person and that is what is provided for by sub-section (2). In so far as the licensee has not taken the owner's permission to carry the High Tension lines over his land and across the cocoanut tope to a length of over one mile,—on the other hand the evidence goes to show the licensee having assured the plaintiff that the carrying of the lines on his land is merely a temporary measure and that the permanent measure would be such as would not interfere with any rights to his land and this assurance not having been carried into effect,—the remedy the plaintiff seeks to enforce against the defendants is one that was available to him at common law and this remedy has not been provided for by section 12 in order to contend that the District Magistrate is the proper forum which should be approached for enforcing such right. The supply of electric energy to institutions, companies or individuals stands on quite a different footing from the establishment of means of communications such as telegraph lines or the telephone lines. No question of urgency has been pleaded by the learned counsel for the first defendant in carrying the High Tension lines on properties belonging to private individuals or local authorities. It cannot be said from the language employed in section 12 that the rights of parties may be violated in view of the urgency of the High Tension lines being carried through another man's property. On the other hand, sub-section (2) of section 12 clearly lays down that the licensee is not authorised to carry High Tension lines or lay down these lines either on the land or

above the land of any private individual or any local authority without his consent and section 12 does not authorise him to do so. The defendant therefore cannot rely upon the analogy of the power vested in the Telegraphic Act to carry telegraphic or telephone lines on properties belonging to private owners. Reliance in this connection has been placed upon section 51 of the Electricity Act which enables the State Government to confer upon the licensee power for the placing of appliances and apparatus for the transmission of energy, subject to such conditions and restrictions as the State Government may think fit to impose and subject to the provisions of the Indian Telegraphic Act any of the powers which the Telegraph authority possesses under that Act, with respect to the placing of telegraph lines and posts for the purposes of a telegraph established or maintained. But this section again is not of any great assistance to the learned counsel for the defendants. The power that is sought to be conferred by the State Government under this is subject to the many limitations and restrictions contained in this section, the most important restriction being that the power could be only for the placing of appliances and apparatus for transmission of energy, and not for the purpose of carrying High Tension lines on any man's property, whereby considerable damage and hindrance is caused to the proper enjoyment of the land. As has been pointed out by the learned counsel for the plaintiff-respondent the danger that would ensue by the telegraphic or telephonic lines is by no means on a par with the danger from High Tension lines for the supply of electric energy ; and as could be noticed, lines for the telegraphic and telephonic communications are meagre and fewer whereas the lines for carrying the High Tension lines for electric energy either for domestic or industrial purposes are far too many and they are always likely to cause danger to any person if carelessly handed.

That apart, whether the civil Court has jurisdiction or not depends entirely on the remedy that is sought to be enforced by the plaintiff who has come to Court. I do not find any substance in the contention of the learned counsel for the appellants, that the remedy that the plaintiff is seeking has been provided for by the statute and that section 12 is self-contained for that purpose. As I have already observed the remedy that the plaintiff has sought to enforce against the defendants is not provided for by section 12 or any of the sub-sections or provisos to that. Therefore in my opinion neither section 12 nor section 51 will be of any avail to the appellants in these cases.

A further point has also been urged by the learned counsel for the appellants. There is no provision in the Act which expressly or by implication ousts the jurisdiction of the civil Court in a case like the one under consideration. No doubt there is provision for reference to arbitration and also for decision by the District Judge in certain cases of claim for compensation. But a claim of the type that is contained in the plaint presented by the plaintiff in this case is not the one that is contemplated by these provisions. Section 52 for instance provides for arbitration. Section 56 provides that no suit shall lie against any public officer for what he has done in the discharge of his duty. Therefore it is well-known and a well-established principle of law that unless there is express ouster of the jurisdiction of the civil Court it must be presumed that ordinarily a civil Court has jurisdiction and in this case the liability has not been excluded from the purview of the civil Court and there is no provision of law contained in the Electricity Act for its adjudication. A complaint of trespass of the kind complained of in the present case and damages therefor is not provided for by any of the sections of the Electricity Act.

The learned counsel for the appellants invited my attention to a serious of decisions. Mr. Parasaran has invited my attention in particular to *S. Amar Singh* v. *Khattar E. E. G. Supply Company*[1]; *Kulikarai Viswanathaswami Temple* v. *Asst. Engineer, Surveys, Electricity Department, Tiruchirapalli*[2]. The rulings in these two cases are unexptionable but the question is how far these rulings would be applicable to the facts of the present case. In my view these rulings are of no assistance to the learned counsel Even so the learned Government Pleader has cited the decision in *Secretary of State* v.

1. A.I.R. 1941 Pesh 73. 2. (1940) 2 M.L.J. 254.

Kameshwar Singh[1], *Jairaj Behari* v. *U.P. Electric Supply Company*[2]. With due respect these decisions are quite unexceptionable on the facts of the cases with which they dealt but so far as the facts in the present case are concerned these decisions have no application whatsoever. Certain observations in these decisions are in fact contrary to the contentions raised by the learned counsel for the appellants. The decisions in *Jit Singh* v. *Gujranwala Electric Company*[3], *Bashir Ahmed* v. *The Crown*[4], seem to be more apposite to the facts of the present case. On the question of jurisdiction Mr. Natesan invited my attention to the latest decision of a single Judge of the Andhra High Court in *May Margaret* v. *Premanandam*[5]. I am in entire agreement with that decision.

Therefore on a consideration of the entire facts and the arguments of learned counsel I have come to the conclusion that in the present case the civil Court has ample jurisdiction to try the suit and the conclusion to which the learned Subordinate Judge of Sivaganga has come is quite warranted and justified. That decision is upheld and these appeals are dismissed with costs in C.M.A. No. 147 of 1958.

Leave is asked for and is refused.

V.S. ——— *Appeals dismissed. No leave.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BASHEER AHMED SAYEED.

Muthumeenatchiya and another .. *Appellants**

v.

The Assistant Director of Fisheries, Tuticorin .. *Respondent.*

Workmen's Compensation Act (VIII of 1923), sections 30 and 2 (1) (n)—Divers employed by the Government Fisheries Department for chank fishing—Whether workmen within the meaning of the Act—Scope of the appeal on this question of fact.

Notwithstanding the fact that the finding as to whether the deceased persons were workmen within the meaning of the Workmen's Compensation Act was a question of fact still an appeal would lie to determine as to whether the finding had been arrived at properly and correctly on the basis of the evidence adduced.

The work of the divers is such they have to perform their duties in accordance with the conditions that have been imposed and which they have to observe strictly in the course of performing their job. Though the divers are not completely under the control of the Department of Fisheries, to the extent to which the nature of their work and scope of the business that the Government is engaged in permits or allows they are certainly under the control of the Government. The diving by the divers for bringing up chanks, the evaluation of the chanks, the rate of payment, the rejection of the unwanted chanks and their being sent back to the sea, the hours when they have to dive and the times they have to stop at the signals given by the guides, all point out to the control exercised by the Government Department. They are workmen within the meaning of the Act entitled to compensation.

Case-law discussed.

Appeals against the Orders of the Court of the Additional Commissioner for Workmen's Compensation, Madras, dated 7th February, 1957 and made in W.C. Case Nos. 513 and 476 of 1955.

S. Mohankumaramangalam, for Appellants.

The Government Pleader (*K. Veeraswami*), for Respondent.

The Court delivered the following

JUDGMENT.—These two appeals arise out of the orders passed by the Additional Commissioner for Workmen's Compensation, Madras, in W.C.C. Nos. 476 and 513 of 1955. The appellants in these two cases claimed a compensation of Rs. 4,000 each from the opposite party, stating that their respective husbands who were employed as divers for chank fishing received injuries by accident on 4th February, 1955 and

1. A.I.R. 1936 Pat. 87.
2. A.I.R. 1941 All. 425.
3. A.I.R. 1929 Lah. 226.
4. A.I.R. 1951 Punj. 51 (F.B.).
5. (1958) 1 Andh. W.R. 283.

* A.A.O. Nos. 239 and 338 of 1957. 16th March, 1959.

7th March, 1955, respectively while working as divers for the opposite party and died as a result of it, one on 8th February, 1955 and the other on 10th March, 1955.

The opposite party disclaimed liability on the ground the husbands of the appellants were not workmen within the meaning of the term, as defined in the Workmen's Compensation Act. The learned Additional Commissioner, in both the cases, framed three issues. The first was whether the deceased were workmen within the meaning of the Workmen's Compensation Act. The second was whether their death was due to an accident which arose out of and in the course of their employment. The third was what was the amount of compensation, if any, payable to them.

On the first issue the learned Additional Commissioner held in both cases that there was no employer and employee relationship between the Department and the deceased, and that the deceased were not workmen, as defined in section 2 (1) (*n*) of the Workmen's Compensation Act. On the second issue, he held that the death of the appellants' husbands was due to the accident which arose out of and in the course of their employment. On the third issue, he held that the compensation payable in each would be a sum of Rs. 3,500 if the parties were entitled to the same. Aggrieved by these findings, the appellants have preferred these appeals.

It may be mentioned at the outset that after the Additional Commissioner gave these findings, it transpired that each of the parties was paid a sum of Rs. 500 by way of *ex gratia* compensation for the death of their respective husbands. Probably if the *ex gratia* payments had been in proportion to what exactly they would have been entitled to according to the calculations given by the Additional Commissioner, these appeals would have been avoided. But actually the *ex gratia* payment works out at a very low figure; probably 1/7th of what exactly they would have been entitled to if the findings had been in their favour.

A preliminary objection was taken by the learned Government Pleader that the finding as to whether the deceased husband of the appellants were or were not workmen within the meaning of the term as defined by the Workmen's Compensation Act was a pure question of fact, and that no appeal was competent under section 30 of the Workmen's Compensation Act. In support of his contention the learned Government Pleader relied on the decisions in *Ramaswami* v. *Poongavanam*[1], *P. G. Abdulla Kutty* v. *Janaki*[2], *Erie County Natural Gas and Fuel Co.* v. *Carroll*[3] and *D. C. Works Ltd.* v. *State of Saurashtra*[4]. After careful consideration of all the authorities relied upon by the learned Government Pleader, I am of the opinion that notwithstanding the fact that the finding as to whether the deceased husbands of the appellants were workmen or not within the meaning of Workmen's Compensation Act, was a question of fact, still the appelas would lie to determine as to whether the finding had been arrived at properly and correctly on the basis of the evidence adduced in Court and the circumstances that pertain to the matter. The contention in the present cases on behalf of the appellants is that the evidence does not warrant the finding which the Additional Commissioner gave, namely, that the divers in the present appeals are not workmen within the meaning of the term as defined in the Workmen's Compensation Act. When such a question is raised it is futile to argue that since the Additional Commissioner has found that there is no relationship of employer and employee between the divers and the opposite party, the qustion cannot be gone into in an appeal. On the other hand, every one of the cases relied upon by the learned Government Pleader has proceeded on the basis as to whether the Courts below have correctly adjudged on the basis of the evidence that the appellants are or are not workmen or employees within the meaning of the term as defined in the respective laws governing the cases. I am, therefore, of the opinion that there is no point in the preliminary objection taken by the learned Government Pleader as to the maintainability of the appeals. As a matter of fact, a perusal of the judgments relied upon by the learned Government Pleader do indicate that after setting out the finding as to the existence of relationship of master and servant or employer and employee or worker and factory

1. (1953) 1 M.L.J. 557.
2. (1952) 1 M.L.J. 475 : I.L.R. (1952) Mad. 1005 : A.I.R. 1953 Mad. 837.
3. L.R. (1911) A.C. 105.
4. A.I.R. 1957 S.C. 264 : 1957 S.C.J. 208: (1957) S.C.R. 152.

owner, the Courts have gone into the very question as to whether the conclusions arrived at by the Courts below are warranted or not on the evidence on record. This is what exactly the learned counsel for the appellants invites me to do, namely, to determine whether the conclusions arrived at by the Additional Commissioner are well-founded and whether they can be upheld in the face of the evidence and circumstances that emerge in the present cases.

Then the question that arises for determination is whether in the present two cases there exists a relationship of employer and employee or master and servant between the Department of the Government, chank fisheries and the divers, husbands of the two appellants. First of all, we have to remember that the business in which the Department of Government is interested is to secure chanks fishing for the same underneath the sea, and for that purpose they have to employ divers. Without the employment of divers by the Department of the Fisheries, chanks cannot be brought up from the sea and the Government cannot carry on business in chank fishing. The question then is whether there is a contract of service or contract as between the divers and the Fisheries Department. In this connection, it becomes relevant to find out what exactly is the nature of this chank fishing. A number of divers is required for bringing out chanks from underneath the bed of the sea. It cannot be the case that all these divers who are employed by the Fisheries Department for fishing chanks and bringing them on the surface, are to be classified as independent contractors for the mere reason that they are paid for each chank at certain stipulated rates according to the quality of chank that is brought up. It would then mean that if a 1,000 or 2,000 divers are engaged in the business of picking up these chanks from underneath the sea, the Government is entering into about 1000 or 2000 independent contracts with these persons for the supply of chanks. This could hardly be the case, and it appears to be an inconceivable position that these divers who are employed to bring up these chanks are independent contractors with whom the Government Department has entered into a contract for service. On the other hand, the work of the divers is such they have to perfrom their duties in accordance with the conditions that have been imposed and which they have to strictly observe in the course of their performing their job. Though the divers are not completely under the control of the Department of Fisheries, still they are certainly under the control of the Department to the extent to which the nature of their work and the scope of the business that the Government is engaged in permits or allows ; that is to say, the diving by the divers for bringing up chanks, the evaluation of the chanks, the rate of payment, the rejection of the unwanted chanks and their being sent back to the sea, the hours when the divers have to dive and the times they have to stop at the signlas given by the guides—all point to the conclusion that the Fisheries Department does exercise such control over these divers as the nature of the business in which the Government Department is engaged in permits or allows.

The argument of the learned Government Pleader is that simply because these divers are given licenses to carry on the profession of diving, it cannot be said that they are acting under the control of the Department of Fisheries. I do not think that this contention has any force. The licence does really set out the terms and conditions under which diving should be carried out. The conditions in the licence do not enable the divers to do as they please without any control being exercised over their work as divers by the Department of Fisheries. It is not as if the divers can dive in any area at any time they please, or dispose of the proceeds to any person and at any rate they please. The control which the Fisheries Department exercises over the divers in chank fishing is much the same as one could imagine in the case of other business carried on by the factory owners such as beedi factory owners and textile factory owners. In my opinion, the actual relationship, the contractor of the business, the nature of the process by which the Government carries on the business of chank fishing, the actual directions and control in the manner of work to be carried out, exercised on the divers—all point only to the conclusion that the amount of control that could be permitted in the business of this type is really exercised by the Department of Fisheries. And such being the case, the relationship

of employer and employee or master and servant, does come into existence in this case as between the Government Department and the divers.

The learned Government Pleader and the learned counsel for the appellants have relied on the same decisions, namely, the decisions in *D. C. Works, Ltd.* v. *State of Saurashtra*[1] and *Chintaman Rao* v. *State of M. P.*[2], in support of their respective contentions. I do not think that the *ratio decidendi*, as could be gathered from these judgments, helps the learned Government Pleader so much as it helps the learned counsel for the appellants. The learned Government Pleader has also invited my attention to an unreported judgment of Rajagopalan, J., in *Annamalai Mudaliar and Bros.* v. *Regional Provident Fund Commissioner, Mount Road, Madras and others*[3], which was later on confirmed in an appeal by a Bench of this Court. I do not think that the facts in that case are *ad idem* with the facts in the present cases. The observations made by the Supreme Court at page 267 in paragraphs 9 and 26 in *D. C. Works, Ltd.* v. *State of Saurashtra*[1], seem to be more apposite and applicable to the facts of the present cases. In that view I am inclined to hold that the divers in the present cases are certainly workmen within the meaning of the term as defined in the Workmen's Compensation Act, and that the appellants will be entitled to the compensation according to the calculations made by the learned Additional Commissioner. I do not think there is any controversy with regard to the calculations that have been made and the cause of the death of the divers. Such being the case, the wives of the divers will be entitled to a sum of Rs. 3,500 each. I direct that the Government do make payment of these amounts to the appellants who are wives of the divers. Of course, the *ex gratia* payment made will be taken credit of while making he payment. There will be no order as to costs.

V.S. *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Hatim Mahmood .. *Petitioner**

v.

A. C. T. O., Mount Road, Madras .. *Respondents.*

Madras General Sales-tax Rules (1939,) *rule 21-A—Transfer of business—Notice of demand on reassessment to the transferee—Transferor and Transferee—Liability of.*

Rule 21-A of the Madras General Sales-tax Rules lays down that both the transferor and the transferee of a business will be liable for the sales-tax.

In the instant case the distress warrant was directed to be issued in the first instance to the transferor and only if the amount cannot be realized from him, the transferee should be proceeded with.

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to direct stay of further proceedings (regarding the distress warrant issued) in Crl.M.P. No. 286 of 1959 on the file of the Fifth Presidency Magistrate of the Court of Presidency Magistrates, Egmore, Madras, pending further orders on this petition.

S. Krishnamurthi, for Petitioner.

The Public Prosecutor (*P. S. Kailasam*), on behalf of the State.

The Court made the following

ORDER.—In this case there has been transfer of a business in ball bearings from one Balakrishnan to the present petitioner, Hatim Mahmood. The transfer was made on 20th March, 1955. In respect of the alleged amount due by way of sales-

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1. (1957) S.C.J. 208 : 1957 S.C.R. 152 : A.I.R. 1957 S.C. 264.
2. (1958) S.C.J. 753 : (1958) M.L.J. (Crl.) 569 : A.I.R. 1958 S.C. 388.
3. W. P. No. 445 of 1954.

*Crl.M.P. No. 200 of 1959.

3rd April, 1959.
(13th Chaitra, 1881 Saka.)

tax for 1951-52 and 1952-53 under alleged reassessment as per assessment orders dated 6th April, 1955 and 27th January, 1956, notice of demand had been issued on 27th April, 1955 and 18th February, 1956, to this Hatim Mahmood. The demand had not been complied with by this Hatim Mahmood, and therefore, distress warrant had been issued by the Magistrate.

The point for consideration is against whom this distress warrant should be issued. Rule 21-A of the Madras General Sales-tax Rules shows that both the transferor and transferee will be liable. This must be so, because the Government cannot be done out of the sales-tax by each passing the buck to the other.

In the present case for the reasons set out in the affidavit of Balakrishnan this distress warrant should be issued in the first instance to the transferor and only when the amount cannot be realised from him, the transferee should be proceeded with. The Fifth Presidency Magistrate, Egmore, Madras, will issue a distress warrant in the light of the observations made above.

V.S. *Orders accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction).

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

Sajjan Bank, Alandur, by Director Kevalchand Lalwani .. *Petitioner**

v.

Reserve Bank of India, Madras, by Deputy Chief Officer .. *Respondent.*

Banking Companies Act (*X of* 1949), *section* 22—*Validity*—*If opposed to Article* 19 (1) *of the Constitution of India* (1950)—*Delegation of power to Reserve Bank*—*If unconstitutional.*

Section 22 of the Banking Companies Act, 1949, which introduces a complete system of licensing of banks by the Reserve Bank is not unconstitutional and is not opposed to the fundamental right of a citizen to carry on banking business. The system of licensing contemplated under the section applies only to the particular system of banking where the customers are enabled to operate by cheques and the object of the licensing is only to regulate the business of banking in that form. The power of licensing is not vested with a mere officer of the Bank and the standard for the exercise of the power is laid down in the section itself, and the power granted to the Reserve Bank is not an arbitrary one. Nor could it be said that the delegation of the power to the Reserve Bank is in any way invalid.

(History of the establishment and function of the Reserve Bank and the passing of the Banking Companies Act traced).

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the Notice dated 18th March, 1957, issued by the Respondent in DBO (M) No. L.I. 485/Ns. S. 2 (L)-57 and to quash the same and to award the costs of this petition.

K. Rajah Iyer, S. Mohankumaramangalam and *K. V. Sankaran,* for Petitioner.

The Advocate-General (*V. K. Thiruvenkatachari*) instructed by *Messrs. King and Partridge,* Attorneys for Respondent.

The Court made the following

ORDER.—This is a petition under Article 226 of the Constitution for the issue of a writ of *certiorari* calling for the records connected with the notice dated 18th March, 1957, issued by the Reserve Bank of India, Madras, in DBO (M) No. L.I. 485/Ns. S-2 (L)-57 and quashing the same.

The Sajjan Bank (Private) Ltd., which is carrying on business at Alandur, originated from Sajjan & Co., Ltd., which was incorporated in November, 1944, with the main object of carrying on money-lending business. In May, 1946, the Company was converted into a banking company and in November of that year its name

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* W.P. No. 373 of 1957. 1st May, 1959.

was changed into Sajjan Bank (Private) Ltd. All its shares are held by its three directors who are said to be closely related. The Banking Companies Act, 1949, referred to hereafter as the Act, came into force on 16th March, 1949. Section 22 of the Act provided amongst other things that every banking company in existence at the commencement of this Act should before the expiry of six months from such commencement and, every other company before commencing banking business in India, apply in writing to the Reserve Bank for a licence under the section to carry on banking business. The section further provided that the Banking Companies in existence at the commencement of the Act could continue to carry on their banking business till final orders were passed on their applications for licence.

On 14th September, 1949, the petitioner-bank applied under section 22 of the Act, to the respondent for a licence to carry on banking business. The Officers of the Reserve Bank inspected the petitioner-bank under section 22 of the Act in July, 1952. A report of that inspection was prepared on 11th October, 1952. The inspection appears to have revealed the existence of certain defects in the working of the Bank. The Reserve Bank therefore decided to keep in abeyance the consideration of the question of issuing a licence evidently with a view to watch the progress of the bank in eradicating the defects pointed out by the inspection report. The defects noticed were the subject-matter of subsequent correspondence between the petitioner and the Reserve Bank. A fresh inspection of the petitioner-bank was carried out in September, 1956, under section 35 of the Act. That also revealed certain defects. The respondent was evidently not satisfied that the affair of the petitioner-bank were being conducted in the interests of the depositors. The question of the grant of licence was taken up. The petitioner was directed to show cause against the refusal of the licence. The Bank was also furnished with a copy of the inspection report. After considering the representation of the petitioner the respondent by its letter dated 18th March, 1957, declined to grant the licence to the petitioner to carry on banking business in terms of the First proviso to sub-section (2) of section 22 of the Act. Aggrieved by that the petitioner has moved this Court for the issue of a writ of *certiorari* to quash the order of the respondent refusing to grant a licence to carry on business as a banking company.

The petition is contested by the respondent, the Reserve Bank of India.

Mr. Rajah Iyer, the learned advocate for the petitioner, raised before me three contentions :

(1) That section 22 of the Banking Companies Act was unconstitutional in so far as it proceeded to restrict the fundamental right of the petitioner to carry on its business, namely the banking business.

(2) Even if the provisions of section 22 of the Act be held to be in accordance with the Constitution, the action of the respondent was arbitrary.

(3) In any event the procedure adopted by the respondent was illegal in that after an inspection under section 35 it could only proceed to act under section 35 (4) and not refuse the licence altogether.

Before considering the various contentions urged on behalf of the petitioner, it is necessary to refer briefly to the position of the Reserve Bank of India and also to certain provisions of the Banking Companies Act of 1949.

The Reserve Bank of India came into existence on 1st April, 1935. It is a Central Bank combining in its functions the regulation of both the credit and the currency of the country. Prior to its formation the responsibility for the currency was vested in the Central Government. The banking functions were performed by the Imperial Bank of India. This dichotomy between currency and credit was found to be a weakness in the Indian monetary system by the Royal Commission on Indian Currency and Finance in 1926. The Commission recommended the establishment of a Central Bank by charter on certain lines which experience had proved to be sound. It is said that the structure of the Bank was modelled very

largely on the Bank of England. It is a non-political statutory body, the general superintendence and management of the bank's affairs being vested in the Central Board of Directors. For each of the four regional areas, Bombay, Calcutta, Madras and New Delhi there is a local Board functioning. The functions of the local Boards are to advise the Central Board on such matters as may be referred to them or perform such duties as the Central Board may validly delegate to them. The Preamble to the Reserve Bank Act states that the bank was constituted to regulate the issue of bank notes, to keep up reserves with a view to secure monetary stability in India and generally to operate currency and credit system of the country to its advantage. The main function, therefore, of the Reserve Bank is to regulate the monetary system of the country so as to ensure the maintenance of economic stability and assist in its growth. The Bank has got the sole right to issue currency notes and it also acts as the banker to the Government. It also acts as a banker to the various commercial banks and other financial institutions and it has got various rights and duties prescribed in Chapter II of the Reserve Bank Act. For the performance of its duties in regard to the regulation of the credit of the country, the Reserve Bank is invested with powers of control of the bank rate, open market transactions, etc. The Reserve Bank's responsibilities include the developement of an adequate and sound banking system not only for trade and commerce but also for the agricultural industry. The Reserve Bank is, therefore, occupying a position of considerable importance in the economic development of the country and its monetary system.

Originally joint stock banks were governed in respect of their incorporation, organisation and management by the Indian Companies Act of 1913, which was common to banking as well as non-banking companies. In 1936 certain new provisions were inroduced in the Indian Companies Act of 1913 in regard to the banking companies. In 1949 the Banking Companies Act was passed to consolidate and amend the law relating to the Banking Companies. The necessity for the legislation was for safeguarding the interests of the depositors, shareholders and of the economic interests of the country in particular. Under section 5 (*b*) of the Act the term ' banking ' has been defined as

> " accepting, for the purpose of lending or investment, of deposits of money from the public, repayable on demand or otherwise, and withdrawable by cheque, draft, order or otherwise."

This definition follows the accepted legal concept of the word ' banking '. In Hart on the 'Law of Banking' a banker or a bank has been defined as

> " a person or company carrying on business of receiving moneys and collecting drafts for customers subject to the obligation of honouring cheques drawn upon them from time to time by the customers to the extent of the amounts available on their current accounts."

The essence of a banking business is, therefore, receiving money on current account for deposit from the public repayable on demand and withdrawable by cheque, draft or otherwise.

An ordinary money-lender who does not accept moneys on terms enabling a depositor to draw cheques upon him would not, therefore, be a bank or banker properly so called. The provisions of the Act would, therefore, apply only to the limited class of cases where the bank or banker allows the withdrawal of money by the issue of cheques. A banking company has been defined to be a company which transacts the business of banking in India. Section 6 provides that in addition to banking business a banking company may engage themselves in various allied businesses which are more or less incidental to or essential for the carrying on of the banking business. Section 13 prescribes the minimum standards as to paid-up capital and aggregate reserves. Sections 12 and 12 (*a*) prevent the control of companies by a few persons to the deriment of a majority of shareholders and permits the Reserve Bank of India to require a banking company to call for a general meeting of the shareholders of the company, to elect fresh directors in accordance with the voting rights. Section 14 prohibits the creation of charges on unpaid capital. Sections 17 and 18 provide for minimum reserve funds and cash reserve. Section 20 prohibits loans on security of the company's shares and un-

secured loans to its directors to firms or private companies in which they are interested. Section 21 gives power to the Reserve Bank of India to control its advances. Section 22 prescribes a system of licencing of banks, the power of licencing being vested in the Reserve Bank of India. I shall advert to that section in greater detail presently. Section 23 places restrictions on the opening of new places of business or change of existing place of business. Sections 24 and 25 require the maintenance of sufficient liquid assets. Section 26 obliges a bank to report to the Reserve Bank every year about unclaimed deposits. Sections 27 and 28 invests a power in the Reserve Bank to call for information and to publish them if it so decides. Sections 35 and 36 confer power in the Reserve Bank of India to call for periodical returns and inspection of books of accounts and empowers the Central Government to take action against banks conducting business in a manner detrimental to the interests of the depositors. Section 35-A gives powers to the Reserve Bank of India to give directions to the banking companies in general, or to any banking company in particular, in the national interest or to prevent the affairs of any banking company being conducted in a manner detrimental to the interests of the depositors or in a manner prejudicial to the interests of the banking company or to secure proper management thereof. There are also other provisions relating to the management, restriction on the holding of shares and in regard to the winding up of banking companies. Thus the legislation is a comprehsnsive measure, covering the establishment, the working and the liquidation of the banks. The Reserve Bank of India is substantially invested with the power of regulation of the banking companies. In this country there are various types of banks ranging from the village money-lender to a big commercial bank. It was found necessary in the interest of the public that there should be a regulation of the banking system. The Indian Central Banking Enquiry Committee which had submitted its report in 1931 had felt the need for the Special Bank Act. At page 456 of the Report of the Indian Central Banking Enquiry Committee, Part 1, it is observed :

" We, however, recommend that any bank, Indian or non-Indian, wishing to do banking business in India should be required to take out a licence from the Reserve Bank when it is established. This is partly necessary in the interests of depositors and partly for giving the Reserve Bank some control over the banks operating the country. Licences should be freely granted to the already established banks and it would be the business of the licensing authority to see that the provisions of the law and any other conditions specified in the licences are complied with........Having regard to the present stage of literacy of the people, we consider it essential that a bank should be organised on certain recognised principles of banking and that no institution calling itself a bank should start operations without obtaining a licence from the Reserve Bank..........As pointed out by us in Chapter XIX, even the foreign banking experts, who are generally not in favour of introduction of a licensing system recognise that the Reserve Bank may be trusted to act in this respect ' in a sound and impartial way."

Section 22 introduces a complete system of licensing of banks by the Reserve Bank. Shortly stated the grant of a licence in the case of banks incorporated in India is dependent upon the maintenance of a satisfactory financial condition. In the case of foreign banks there is a further condition imposed that the country of their origin could not discriminate in any way against the banks registered in India. Section 22 of the Banking Companies Act runs thus :

" (1) Save as hereinafter provided, no company shall carry on banking business in India unless it holds a licence granted by the Reserve Bank in such behalf.

(2) Every banking company in existence on the commencement of this Act, before the expiry of six months from such commencement and every other company before commencing banking business in India, shall apply in writing to the Reserve Bank for a licence under this section ;

Provided that in the case of a banking company in existence on the commencement of this Act, nothing in sub-section (1) shall be deemed to prohibit the company from carrying on banking business until it is granted a licence in pursuance of sub-section (2) or is by notice in writing informed by the Resrve Bank that a licence cannot be granted to it ;

Provided further that the Reserve Bank shall not give a notice as aforesaid to a banking company in existence on the commencement of this Act before the expiry of the three years referred to in sub-section (1) of section 11 or of such further period as the Reserve Bank may under that sub-section think fit to allow.

(3) Before granting any licence under this section, the Reserve Bank may require to be satisfied by an inspection of the books of the company or otherwise that all or any of the following conditions are fulfilled, namely :—

(*a*) that the company is in a position to pay its depositors in full as their claims accrue ;

(*b*) that the affairs of the company are not being conducted to the detriment of the interests of its depositors ;

(*c*) in the case of a company incorporated outside India that the Government or law of the country in which it is incorporated does not discriminate in any way against banking companies registered in India, and that the company complies with all the provisions of this Act, applicable to banking companies incorporated outside India.

(4) The Reserve Bank may (*a*) cancel any licence granted under this section where any of the conditions set out in sub-section (3), on the fulfilment of which it required to be satisfied when granting the licence, cease to be fulfilled or if the company ceases to carry on banking business in India or goes into Liquidation ;

(*b*) at any time after granting a licence under this section require that any of the said conditions, on the fulfilment of which it did not require to be satisfied when granting the licence, shall be fulfilled to its satisfaction within such time as it may specify, and if the condition is not so fulfilled cancel the licence.

(5) Any banking company aggrieved by the cancellation of its licence under sub-section (4) may appeal to the Central Government, and the decision of the Central Government on such appeal shall be final."

Sub-sections (1) and (2) provide for the necessity of obtaining a licence by a banking company and the time at which the licence is to be applied. The proviso to sub-section (2) authorises an existing banking company to continue to function until it is granted a licence or refused a licence. The conditions for granting the licence by the Reserve Bank are set out in sub-section (3). The section also provides for the cancellation by the Reserve Bank of a licence granted by it. In that case the concerned bank is given a right of appeal. Similar enactments exist in the laws of certain foreign countries like America.

Mr. Rajah Iyer contends that the provision of section 22 (1) are unconstitutional as being in restraint of trade or business as in effect an arbitrary power is vested in the Reserve Bank of India to grant or refuse a licence, which according to him is really a permit for the doing of the business to be granted by the body . He, therefore, contended that the provisions of section 22 (1) of the Act are unconstitutional and invalid. In support of that contention he relied upon the principle stated in *Namazi* v. *Dy. Custodian of Evacuee Property, Madras*[1]. That was a case where a disposition of property by an intending evacuee was made subject to a permission by the Custodian of Evacuee Property. No rules were framed under the Act for his guidance. The nature of the enactment was that the custodian who was a mere officer of the Government could arbitrarily refuse to approve of a transfer by an intending evacuee. My Lord the Chief Justice observed at page 9 :

" It may be said that the Custodian would not ordinarily refuse to approve any transfer unless for proper grounds. But surely that would be gambling on the reasonableness of the Custodian. As the section stands, there is nothing to prevent the Custodian from most unreasonably refusing to approve of any transfer by an intending evacuee."

In *Balakrishna* v. *State of Madras*[2], this point was further adverted to and it was observed that it was dangerous that rights of persons should depend upon any personal quality of a particular officer. But a licence is not necessarily a permit. A licence is intended to regulate a business, while a permit would be one without which a business can never be started so that a permit may amount to a prohibition of the business in regard to persons who are unable to obtain the same. The distinction between a permit and licence has been considered by this Court in *C. M. S. Motor Service* v. *Madras State*[3]. It was held that while a permit system would be unconstitutional in so far as it related to the exercise of fundamental rights, it was well-settled that a system of licensing, which had for its object the regulation of trades, would not be repugnant to Article 19 (1) (*g*) of the Constitution. That decision is also valuable for ascertaining whether in a particular case what was intended was only a licence for the regulation of trade or a permit as a condition precedent to

1. (1951) 2 M.L.J. 1.
2. (1952) 1 M.L.J. 514.
3. (1952) 2 M.L.J. 894 : I.L.R. (1953) Mad 304 : A.I.R. 1953 Mad. 279.

the exercise of a business by an arbitrary power in the authority to grant or refuse a licence. The existence of rules for the guidance of the authority, the insistence of reasons for the refusal of a licence, provision for a right of appeal, the nature of the enquiry before the refusal of licence being judicial in an enquiry were held to constitute that what was prescribed by a statute was only a regulation of trade by the issue of licence and not the insistence of a permit. The question then is whether the provisions of section 22 (1) of the Banking Companies Act which require a licence for carrying on business by a banking company should be held a system of enabling the doing of such a business by the issue of permits or whether only a licence intended to regulate the business of banking. There is no doubt that the Banking Companies Act was passed in the interests of the public after detailed enquiry by a Committee and after consideration of its reports. As I pointed out already the Committee itself recommended a system of licensing of all banking companies. Even the foreign banking experts were not averse to the proposal. The licensing itself is vested in a statutory authority which is itself a Central banking institution concerned both with the currency and credit operations in the country. The Reserve Bank of India was established with a view to fostering the banking business and not for impeding the growth of such business. The powers vested to it under section 22 are not one invested with a mere officer of the bank. The standards for the exercise of the power have been laid down in section 22 itself. The Reserve Bank is a non-political body concerned with the finances of the country. When a power is given to such a body under a statute which prescribes the regulations of a Banking Company, it can be assumed that such power would be exercised so that genuine banking concerns could be allowed to function as a bank, while institutions masquerading as banks or those run on unsound lines or which would affect the interests of the public could be weeded out. The power given is regulated by the statute and being entrusted to a statutory body which is itself regulating the credit of the country ; the nature of the power, its exercise after the investigation prescribed by the statute invests it with a quasi-judicial character. Such a power cannot be said to be an arbitrary one. It is a mere licence granted as a matter of course to all genuine banking institutions run on sound lines as the judicial character of power would indicate. It cannot be held to be a permit.

Mr. Rajah Iyer next contended that while under Article 19 (6) there may be a right to impose reasonable restrictions in the exercise of the fundamental rights of a citizen by the Legislature such restrictions could not be imposed by a subordinate authority like the Reserve Bank of India. His contention is that in the instant case the provisions of section 22 (1) amount to an excessive delegation of legislative powers.

The law in regard to the delegation of legislative powers has now been well-settled by the various decisions of the Supreme Court. In re *The Delhi Laws Act*[1], the limits of delegation of legislative powers have been discussed in detail. Das, J., as he then was, pointed out citing *Cincinnati W. & Z. R. Co.* v. *Clinton County Commissioners*[2].

"The true distinction is between the delegation of power to make the law which necessarily involves a discretion as to what it shall be and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done ; to the latter no valid objection can be made."

In the present case I have already pointed out that the Banking Law has been comprehensively laid down in the Indian Banking Companies Act of 1949. The question then is only to administer the law. A power to carry out its provisions would be necessary having regard to the technical nature of the subject and necessity for the investigation of details in individual cases. Such a power is given to the Reserve Bank of India under section 22. There could therefore be no valid objections to the grant of the power.

In *Harishankar Bagla* v. *The State of Madhya Pradesh*[3], Mahajan, C.J., observed at page 388 thus :

1. (1951) S.C.J. 527 : 1951 S.C.R. 747, 1021.
2. 1 Ohio St. 88.
3. (1955) 1 S.C.R. 380=(1954) S.C.J. 637= (1954) 2 M.L.J. 211.

"In other words, the Legislature cannot delegate its functions of laying down legislative policy in respect of a measure and its formulations as a rule of conduct. The Legislature must declare the policy of the law and the legal principles which are to control any given cases and must provide a standard to guide the officials or the body in power to execute the law. The essential legislative function consists in the determination or choice of the legislative policy and of formally enacting that policy into a binding rule of conduct. In the present case the Legislature has laid down such a principle and that principle is the maintenance or increase in supply of essential commodities and of securing equitable distribution and availability at fair prices. The principle is clear and offers sufficient guidance to the Central Government in exercising its powers under section 3....As already pointed out the preamble and the body of the sections sufficiently formulate the legislative policy and the ambit and character of the Act is such that the details of that policy can only be worked out by delegating them to a subordinate authority within the framework of that policy."

To a similar effect is the decision of the Supreme Court in *Bhatnagars & Co. Ltd.* v. *The Union of India*[1]. In *Niemla Textile Finishing Mills* v. *The Second Punjab Tribunal*[2] while considering the provisions of section 10 of the Industrial Disputes Act which enabled the Government as and when occasion arose to refer industrial disputes arising between the employers and workmen to one or other authorities according to the exigencies of the case, the Supreme Court held thus :

" No two cases are alike in nature and the industrial disputes which arise or are apprehended to arise in particular establishments or undertakings require to be treated having regard to the situation prevailing in the same. There cannot be any classification and the reference to one or the other of the authorities has necessarily got to be determined in the exercise of its best discretion by the appropriate Government. Such discretion is not an unfettered or an uncontrolled discretion nor an unguided one because the criteria for the exercise of such discretion are to be found within the terms of the Act itself. The various authorities are to be set up with particular ends in view and it is the achievement of the particular ends that guides the discretion of the appropriate Government in the matter of setting up one or the other of them. The purpose sought to be achieved by the Act has been well defined in the preamble to the Act. The scope of industrial disputes is defined in section 2 (*k*) of the Act and there are also provisions contained in the other sections of the Act which relate to strikes and lock-outs, lay off and retrenchment, etc. . . . .

Following the observations of the Supreme Court, I am of the opinion that in the present case there is sufficient legislative guidance for the granting of licence embodied in the provisions of the Act and of section 22 in particular, and the delegation of the power having been made to a non-political body who is statutorily vested with the credit structure of the country, it could not but be held that the restriction imposed in the regulation of the banking business is anything but reasonable.

It must also be noticed that the refusal of the licence under section 22 of the Act does not mean a stoppage of business. I have already referred to the fact that the essence of banking is the opening of current account and the enabling of the constituent to draw by cheques. It follows that the refusal of a licence would only entail a loss of that type of business, and it would be perfectly open to the petitioner to carry on business as money-lenders the only disability or restriction being that it cannot have transactions under which the constitutent could draw cheques on him.

In *Yakus* v. *United States*[3] it was held that the essentials of legislative functions were the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct, and these essentials would be preserved when the Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective. At page 848 it is stated:

" It is no objection to a statute that the determination of facts and of the inference to be drawn from them, if in inferences to be drawn from them, in the light of the statutory standards and declaration of policy, call for the exercise of judgment and for the formulation of subsidiary administrative policy within the prescribed statutory framework. Nor does the doctrine of separation of powers deny the Congress the power to direct that an administrative officer properly designated for that purpose shall have ample latitude within which he has to ascertain conditions which Congress has made pre-requisite to the operation of its legislative command. Since the only concern of the Courts is to ascertain whether the will of Congress has been obeyed and this depends not upon the breadth of the definition of the facts or conditions which the administrative officer is to find, but upon the determination whether the definition sufficiently marks the field within which he is to act, so that it may be known whether he has kept within it in compliance with the legislative will."

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1. (1957) S.C.J. 546 : 1957 S.C.R. 700.
2. (1957) 1 M.L.J. (Crl.) 181 : (1957) S.C.R. 335 : (1957) S.C.J. 275.
3. 88 L. Ed. (U.S.S.C.R.) 834.

The power that is given to the Reserve Bank under the Act is a wide range of administrative discretion which it is peculiarly competent to undertake, and the determination whether the conditions which are required before the licence could be given or refused exist, would be peculiarly within its competence as an expert statutory body, and the Legislature having prescribed the nature of a real banking institution in this country, it could not be said that there has been any excessive delegation of power. As pointed out in *Matajog Dobey* v. *H.C. Bhari*[1] a discretionary power is not necessarily the discriminatory power and abuse of power should not be easily assumed where discretion is vested in a public authority, and not in a minor official. In such cases the delegation as such could not be held to be invalid, though in individual cases, if such a body exceeds its jurisdiction or abuses its power it would be open to an aggrieved party to apply to the suprior Court for the issue of a writ under Article 226 of the Constitution.

This leads us to the next question, namely, whether the power in this case has been arbitrarily exercised by the respondent, as is complained by the petitioner. There is no complaint in this case that sufficient opportunity was not given. But what is contended on behalf of the petitioner is that further opportunities should have been given to rectify the errors rather than refuse the licence. It is also contended that the petitioner had complied with all the directions which the respondent gave from time to time and that there was really no default on its part. Mr. Rajah Iyer also contended that while the respondent was given directions and the petitioner was complying with the same as and when given, the former had made up its mind not to issue the licence and that it did not bring to bear on the decision of the question a judicial attitude. The first inspection by the respondent of the petitioner was in 1952 under the provisions of section 22. That revealed that the petitioner bank was not conducted on sound banking lines. The report, dated 11th October, 1952, pointed out fundamental errors in the accounts as also non-compliance with the provisions of the Act. The Reserve Bank very properly kept in abeyance the decision of the question of the grant of licence. But the Bank being one that came into existence before the Act, it could continue its banking business till the licence was granted or refused. It was, therefore, necessary that some kind of control should be exercised over the bank pending decision on the issue of the licence. They, therefore, proceeded to give periodical instructions in regard to the conduct of the bank. I have said that the first inspection revealed defects in the method of keeping accounts and contravention of certain provisions of the Act. Correspondence that ensued was in regard to both the matters. It was not till 1955 that the defect pointed out were sought to be explained away or remedied. This, therefore, entailed a further inspection, undertaken by the Reserve Bank under section 35 of the Banking Companies Act. A report was duly submitted to the local Board of the Bank, who were satisfied that the proposal to refuse the license was proper in the circumstances. As pointed out in the report of the Reserve Bank on more than one occasion, the bank was not able to effectuate any material improvement in the pattern of its working. It was not able to attract sufficient deposits from the public. As a private limited company to start with it was converted into a banking company evidently to circumvent the provisions of the Madras Pawn-brokers Act of 1943. The paid up capital was only Rs. 50,000. Its reserves were found to be poor and the establishment charges had absorbed more than 50 per cent. of the gross income. The Reserve Bank gave more than one opportunity to the petitioner to show cause against the refusal of licence. In the report placed before the Central Committee, we find a comparative statement of the undesirable features noticed in the inspection reports with the corresponding representation of the bank and the comments of the bank. It was only after a careful consideration of all the matters that the Reserve Bank came to the conclusion that the continuance of the bank would be likely to prove detrimental to the interests of prospective depositors and that the petitioner was not entitled to a licence. The respondent did not take any hasty action. The progress and working of the bank was closely watched for more than 4 years and every opportunity was

1. (1956) S.C.J. 110: (1956) 1 M.L.J. (S.C.) 79: (1956) An.W.R. (S.C.) 79: (1955) 2 S.C.R. 925.

given to the bank to justify its claim as a sound banking concern. The learned Advocate-General explained that the delay in the disposal of the application by the respondent was due to their anxiety not to precipitate a crisis which a quick decision to refuse licence might occasion and which might further lead to undesirable results. Far from the action of the Reserve Bank being arbitrary, I am satisfied that it has given the utmost consideration to the petititoner's case. I can find no justification for the criticism that the respondent had decided to refuse licence, even before waiting to see whether the petitioner rectified the defects. As I have indicated above the directions given by the respondent from time to time were by virtue of their superior powers in respect of a bank which was entitled to do business till the licence was refused and which was so doing. That has nothing to do with the decision of the question of granting licence which was kept in abeyance in 1952.

The last contention of Mr. Rajah Iyer is based upon the provisions of section 35 of the Act. Section 35 enables the Reserve Bank to inspect a bank. Such inspection was done in the present case. Section 35 (4) prescribes that in such a case the matter has got to be reported to the Central Government, and it was only the Central Government that could prohibit the banking company from continuing its business. I cannot, however, accept this argument. Section 35 (4) would relate to a bank for which a licence had already been given. At the same time I am of opinion that it would be open to the respondent to consider the defects or improvements revealed in an inspection under section 35 for disposing of the application for licence as there is nothing in the statute to prohibit it from taking into consideration all relevant facts. There has been no excess of jurisdiction and the refusal of the licence under section 22 (1) of the Act is, therefore, proper in the circumstances of the case.

I am, therefore, of the opinion that the action of the Reserve Bank in refusing to grant the licence to the petitioner is within its jurisdiction, and such jurisdiction has been properly exercised in the case, and that there is no case for the issue of a writ under Article 226 of the Constitution. This petition is dismissed with costs.

R.M. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ANANTANARAYANAN.

Esakki Thevar and others .. *Petitioners**

Criminal Procedure Code (V of 1898), *sections* 435 *and* 439—*Finding of fact—Concurrent findings—Interference in revision—Grounds—Powers of High Court.*

The High Court could and does interfere in criminal revision, even upon findings of fact, and even though they may be concurrent findings of two Courts below where the conscience of the Court is satisfied that in the broad interests of justice, the conviction is not sustainable ; or where the conviction is not sustainable in certain respects because vital evidence has been overlooked or has not been given due consideratilon.

Arjun Lal Misra v. *The State,* A.I.R. 1953 S.C. 411, *Ramaswami Naick* v. *Rangaswami Chettiar,* A.I.R. 1937 Mad. 968, *S. R. Raja Rao,* In re, (1944) 2 M.L.J. 183, *Periakaruppan Chettiar* v. *Chidambaram Chettiar,* 1937 M.W.N. (Crl.) 11 and *National Bank of India, Ltd.* v. *Kothandarama Chetty,* (1913) 21 I.C. 129, relied on.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Additional Sessions Judge of the Court of Session of Tirunelveli Division, dated 9th January, 1959 and made in C.A. No. 215 of 1958 (C.C. No. 218 of 1958, District Magistrate (Judicial), Tirunelveli.

S. Mohan Kumaramangalam and *K. Narayanaswami,* for Petitioners.

Miss Bhyme, for the Public Prosecutor (*P. S. Kailasam*) on behalf of the State.

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*Crl.R.C. No. 53 of 1959. 26th August, 1959.
(Crl.R.P. No. 53 of 1959.) (4th Bhadra 1881 Saka.)

The Court made the following

ORDER.—This is a Revision Petition by the five accused in a criminal case, who were originally convicted by the learned District Magistrate of Tirunelveli under sections 147, 148, 149 and 326 of the Indian Penal Code, and sentenced to several periods of imprisonment. This matter was taken up in appeal to the learned Additional Sessions Judge of Tirunelveli, who considered the facts of evidence in his appellate judgment and confirmed the convictions and sentences.

At the outset itself, when these proceedings in revision were argued, the limits of the propriety of interference in criminal revision by the High Court in a case of this kind, where there are concurrent findings of fact by two Courts below, were canvassed as I felt that it was essential that this should be clarified. The matter has now been argued at some length by learned counsel for the revision petitioners, and also the learned Public Prosecutor, with reference to the available authorities, both of the Madras High Court, other High Courts and the Supreme Court. It is not necessary for the purpose of the present judgment to make an exhaustive review of the case-law cited before me. But certain of the decisions have necessarily to be referred to, at the outset, itself, so that the broad landmarks of the applicable principle may be illustrated.

In a very early Full Bench decision of the Madras High Court in *National Bank of India, Ltd.* v. *Kothandarama Chetty and another*[1], the proposition was laid down that the High Court possesses plenary powers of interference even in a criminal revision, even upon a question of fact, though, of course, such power should be exercised with circumspection, and only where interference is called for in the broadest interest of justice. In a subsequent decision of this Court in *K. V. Ramaswami Naik and another* v. *Rangaswami Chettiar*[2], King, J., observed, that, even in criminal revision, where the Courts below had not approached the case either with a clear appreciation of the issues involved, or clear understanding of the principles of criminal law, interference by the Court of revision would be just and appropriate. Of the decisions of the Supreme Court, it may be necessary to refer to the decision in *Arjun Lal Misra* v. *The State*[3], where Fazl Ali, J., observed that though the powers of the High Court to interfere on findings of fact in criminal cases are indisputable, before that is done, the relevant facts upon which the findings are based should be carefully scrutinised and weighed. In a decision of the Madras High Court in *S.R. Raja Rao*, In re[4], there is an observation in passing by Leach, C.J., to the effect that the High Court would not interfere in criminal revision upon the merits, unless the record shows that the evidence is not capable of sustaining the conviction. In *Periakaruppan Chettiar* v. *Chidambaram Chettiar*[5], Pandrang Row, J., pointed out that the case for interference in criminal revision with the finding of fact by a Magistrate, was stronger where a non-appealable sentence had been given. Finally, my attention has been drawn to a recent decision of Ramaswami, J., in Criminal R.C. No. 256 of 1959 (so far unreported) where the principle has been discussed at some length. To quote the learned Judge:

> "Where a case arises for going into the facts of the case, the High Court will not interfere, unless the conscience of the Court is aroused to such an extent as to compel the Court to expressly say that the appellant ought not to have been convicted on the evidence."

The decision then proceeds to enumerate certain categories, where the High Court would be justified in interference in criminal revision, even upon a question of fact. But I take it that it is the broad principle, as stated above, which governs this matter, and that the categories may not be exhaustive. Hence, the conclusion upon this aspect would be that the High Court could and does interfere in criminal revision, even upon findings of fact, and even though they may be concurrent findings of two Courts below, where the conscience of the Court is satisfied that, in the broad interests of justice, the conviction is not sustainable ; or where, as in this case, the conviction is not sustainable in certain respects, because vital evidence has been overlooked, or has not been given due considerations.

1. (1913) 21 I.C. 129.
2. A.I.R. 1937 Mad. 968.
3. A.I.R. 1953 S.C. 411.
4. (1944) 2 M.L.J. 183.
5. 1937 M.W.N. (Cr.) 11.

Now, coming to the facts of the present case, I have been taken through the record of evidence, and the judgment of the two Courts below. I desire to say very little upon the broad aspects of this offence which undoubtedly did occur, as a result of faction and ill-will, and during the course of which the complainant (P.W. 1) sustained certain punctured and incised wounds, as shown by the medical evidence. A certain difficulty in this case is that the first information was a bald oral report furnished by the son of the complainant, who has not been examined, to the effect that A-1 and other assail nts caused injuries to his father (P.W. 1). In that view, the learned Additional Sessions Judge in appeal rightly excluded the subsequent recorded first information report (P-1) from consideration, as within the mischief of section 162 of the Code of Criminal Procedure. Another difficulty in the present case is that A-4 also sustained some injuries, and that he furnished a counter version of this incident (P-8), though belatedly.

However this might be, upon the merits of the evidence, I see no reason at all to interfere in revision, as far as the convictions of A-1, A-2 and A-4 are concerned. The learned eounsel for the 4th accused has stressed the difficulty that the dying declaration of the complainant (P-2) ascribes to A-4 only some kind of attack with a stick or vel (it is not all clear which weapon), without giving any more specific detail. But the oral evidence definitely shows that A-4 cut the complainant on the right foot with an aruval, and this is consistent with the record of investi ation (P-1), though that is not the first information report, and is not substantive evidence. If it did not contain anything contradictory to the oral evidence regarding the part played by A-4, that would undoubtedly have been elicited in defence.

But with regard to A-3 and A-5, I have no doubt whatever that they were not present, and that they were falsely implicated in the present case, which may be true enough in other particulars. Actually, from the very first, there seems to have been some difficulty and hesitancy in ascribing any specific overt acts to these accused, or even in affirming their presence. This consideration pplies with all the stronger force, because A-3 seems to have been the leader of this opposite group, and if he had been presented and had inflicted the injuries, undoubtedly that would have been affirmed even in the very first complaint. On the contrary, the Circle Inspector, P.W. 9 concedes that both P.W. 1 and P.W. 2 at one stage of the interrogation, were not prepared to say that A-3 and A-5 were there. Even more importantly, we have the striking fact that the medical evidence is totally inconsistent with the parts now ascribed to those two assailants (A-3 and A-5), of inflicting injuries with sticks. This is a vital aspect of the evidence which the lower appellate Court as well as the trial Court has virtually overlooked. It is true that the learned Sessions Judge, in appeal, refers to this difficulty in the evidence. But he appears to think that such injuries might have been caused, and may, nevertheless, have subsequently disappeared. I see no grounds for any such assumption, and this isclearly against the well-known facts of medical jurisprudence. Since there was not even a single injury due to a blunt weapon on the person of the complainant, it is abundantly clear that A-3 and A-5 did not beat him with sticks as alleged, and that this is a belated and false development of the case. Where the record shows this, Court of revision would be certainly justified in interference, upon substantial grounds of justice.

Under the circumstances, I allow this revision petition to the partial extent of setting aside the conviction and sentence upon A-2 and A-5 respectively. As regards A-4, I note that he has been convicted only under section 326, Indian Penal Code, read with section 149 of the Indian Penal Code, without any specific overt act of hurt being proved against him, and he has been sentenced to rigorous imprisonment for one year. Under the particular circumstances, I direct that the sentence upon him be reduced to rigorous imprisonment for six months. The other sentences are confirmed. The revision petition is otherwise dismissed.

P.R.N. ——— *Convictions of A-2 and A-5 set aside. Sentence of A-4 reduced. Revision petition dismissed in other respects.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ANANTANARAYANAN.

Chinnappa Naicker .. *Petitioner**

v.

A.P.C. Umapathy Nayagar .. *Respondent.*

Madras Cultivating Tenants Protection Act (XXV of 1955), *section* 2 (*e*)—" *Landlord* "—*Power-of-attorney agent of legatee under registered will of previous admitted landlord—Right to apply for eviction—Section* 3 (2) (*d*)—*Wilful denial of landlord's title—What amounts to.*

" Landlord " as defined in section 2 (*c*) of the Madras Cultivating Tenants Protection Act, 1955, would clearly include any person who is entitled, under the Common Law, to evict a cultivating tenant from a holding, exercising the same rights as his predecessor-in-interest. The definition is framed so as to include every person who can claim rent as " landlord" and who thus, by the tenant's default to pay rent, can evict him. A power-of-attorney agent of a legatee under a registered will executed by the previous and admitted landlord would therefore be a landlord entitled to evict a cultivating tenant.

Ramaswami Naidu v. *Marudaveera Moopan*, (1959) 1 M.L.J. 25, distinguished.

The mere fact that the cultivating tenant who is proceeded against for eviction seeks to maintain that the petitioner in the eviction petition may not be entitled to have the legal status of a "landlord" in the very proceedings themselves would not constitute wilful denial of title within the meaning of section 3 (2) (*d*) of the Madras Act XXV of 1955. Such a denial as a ground of eviction must obviously relate to a case wherein there has been a previous acknowledgment of title, or an agreement of tenancy directly between the very parties themselves.

Petition under section 115 of Act V of 1908, praying the High Court to revise the Order of the Court of the Revenue Divisional Officer, Saidapet, Madras, dated 1st November, 1957 and made in T.A. P. No. 15 of 1957.

R. Deenadayayulu, for Petitioner.

R. Rajagopala Ayyar and *R. Subramania Iyer*, for Respondent..

The Court delivered the following

JUDGMENT.—The revision petitioner is the tenant against whom eviction was ordered by the Revenue Court under Madras Act XXV of 1955. An interesting point is argued in these proceedings that the petitioner in the lower Court was not the "landlord" as defined in section 2 (*e*) of the Act, for the reason that the petitioner in the lower Court is only the power-of-attorney agent of a legatee under a registered will executed by the previous and admitted landlord, since deceased.

Now, "landlord" is defined as "a person entitled to evict the cultivating tenant from such holding or part". The question is whether the definition would include any person, who, by devolution of law or by any valid disposition of property, obtains an interest in the holding and in the subsisting tenancy. It is true that the definition is cryptic, and somewhat unhelpful. But I see no ground for assuming that when at least applied to a person, who, by devolution of law or by a disposition in his favour, is entitled to the interest in the holding, or the interest in the tenancy the definition would not clothe him with the right. The words of the definition as they stand would clearly include any person who is entitled, under the Common Law, to evict a cultivating tenant from a holding, exercising the same rights as his predecessor-in-title. A contrary interpretation would lead to very great difficulties. In the case of the death of a landlord, it would leave the tenant in virtual possession of the holding owing no obligation to pay rent to anyone, and not being liable to be evicted from the holding by any person whatever. I am unable to hold that this was the intention of the Legislature in framing this definition. The argument that the person upon whom the right of the landlord devolves in law must first proceed to a Civil Court to obtain a declaration of his right, overlooks the fact that the definition is framed so as to *include* every person who can claim rent as 'landlord' and who thus, by the tenant's default to pay rent, can evi t him. Further, the logic is obvious that had the Le islature intended to exclude the person, who by devolution of legal rights

*C.R.P. No. 248 of 1958. 20th August, 1959.

would normally be entitled to evict a tenant, or to claim rent from him, some circumscribing or limiting language to that effect would have been employed. The decision in *Ramaswami Naidu and another* v. *Marudaveera Moopan*[1], is unhelpful here, for, it deals with the definition of a "cultivating tenant" and holds that the assignees of the original lessee are not included within that term, by virtue of the language of that definition.

Under those circumstances, I must hold that the petition in the lower Court was competent, and that interference in revision would not be justified. But, the other ground upon which eviction was ordered, *viz.*, wilful denial of title, does not seem to be valid, upon the facts of the case. It is at least a matter of legal interpretation of the Act, whether, in law, the petitioner in the lower Court could apply for eviction as a "landlord", and the mere fact that the present revision petitioner sought to maintain that he may not be entitled to have the legal status, in the very proceedings themselves, would not constitute wilful denial of title. Such a denial, as a ground for eviction, must obviously relate to a case wherein there has been a previous acknowledgment of title, or an agreement of tenancy, directly between the very parties themselves.

In this view, the application was competent; and obviously time should have been allowed to the revision petitioner for payment of the balance of rent, in the interests of justice. This consideration applies with all the greater force because the revision petitioner seems to have paid the balance of rent to certain other persons, in the mistaken idea that they were the persons entitled to claim as "Landlord" under the Act. Hence, I allow the revision petition to the limited extent of modifying the order of the Court below, by directing that the arrears of rent as stipulated in the agreement of tenancy, and as now found due, should be paid within a month from this date, failing which alone, the order of eviction will be applicable. Parties to bear their own costs.

P.R.N. ——— *Revision petition allowed in part. Order modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GANAPATIA PILLAI.

Chinnathambi Goundar .. *Appellant**

v.

Narayanaswamy Goundar and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 21, rule 2—Decree for partition—Statement by the decree-holder in the execution petition that the properties had been divided—Statement would amount to a certificate of satisfaction.

The statement by the decree-holder in the petition for execution of the decree for partition and other reliefs, that the panchayatdars had met and divided the properties though with a qualification that the division was not completed, would amount to a certificate of adjustment under Order 21, rule 2 of the Civil Procedure Code and the Executing Court can go into the question of the division pleaded by the respondent to the Execution Petition.

Lodd Govinda Doss v. *Raja of Karvetnagar*, (1915) 29 M.L.J. 219, followed.

Appeal against the Order of the District Court of South Arcot at Cuddalore, dated 26th August, 1957 and made in A.S. No. 281 of 1956, preferred against the Order of the Court of the District Munsif of Villupuram in E.P. No. 220 of 1955 in O.S. No. 304 of 1943.

N. Arunachalam, for Appellant.

V. Krishnan, for Respondents.

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1. (1959) 1 M.L.J. 25.

* A.A.A.O. No. 90 of 1957.

2nd April, 1959.
(12th Chaitra 1881 Saka).

The Court made the following

ORDER.—This appeal against the appellate judgment of the District Judge of South Arcot is preferred by the plaintiff in O.S. No. 304 of 1943.

That was a suit for partition against the respondent and others. A consent decree was passed in that case which was a combination of a preliminary and final decrees. According to the terms of that decree, six items of immoveable properties owned by the parties were directed to be divided with the help of panchayatdars and the plaintiff was to take ⅓rd share, the first defendant ⅓rd share and the remaining ⅓rd share was to go to the other defendants. The date of this decree was 27th October, 1944. E.P. No. 220 of 1955, ou of which this appeal arises, was instituted by the first defendant for execution of the decree in so far as it related to partition and separate possession of these six items of immoveable properties. The appellant, who was respondent in that Execution Petition, put forward the plea that the panchayatdars had effected division of the properties as early as 1948, and the plaintiff, the first defendant, and the other defendants were in separate possession of the properties allotted to them by the panchayatdars and that there was nothing more to be executed in relation to the relief of partition of immoveable properties. Both the lower Courts, without going into the truth of this alleged partition, negatived the contention of the appellant on the ground that this question could not be gone into by the Executing Court in the absence of a certificate under Order 21, rule 2, Civil Procedure Code. In respect of that position the decision in *Ramakrishna* v. *Balakrishna*[1] was relied upon. That decision, of course, lays down that in a decree for partition, if money is payable by one party to the other, such a decree would come within the definition of a decree contemplated under Order 21, rule 2, Civil Procedure Code, and if objection is put forward to execution of that decree even in regard to a matter not related to payment of money, such objection could not be heard, unless the satisfaction of the decree in regard to that was reported to the Court within the time allowed under Order 21, rule 2.

Mr. Arunachalam for the appellant urged that the decision in *Narayanaswami* v. *Rangaswami*[2], is an authority for his contention that in the case of a partition decree regarding immoveable property, Order 21, rule 2, would not apply. The facts of that case were that the decree provided that on the defendants paying a sum of Rs. 17,000 to the plaintiff, the plaintiff should reconvey certain immoveable properties standing in his name to the defendants. This decree was considered to be not a decree for payment of money and ther fore Ord r 21, rule 2, Civil Procedure Code, would not apply. In the case now before me, admittedly the compromise decree related not only to partition of moveable properties and immoveable properties, b t also to division of outstandings. The decree provided for one party paying money to the other party, representing shares of outstandings collected. The decision in *Narayanaswami* v. *Rangaswami*[2] will not therefore help the appellant. But in the Execution Petition filed herein, there is a recital that the panchayatdars met and attempted division of the immoveable properties having reference to the quality of the lands and that division was effected, though it was not completed. This is relied upon by Mr. Arunachalam as a report of a certificate to Court within the meaning of Order 21, rule 2, Civil Procedure Code. In the decision in *Lodd Govinda Doss* v. *Rajah of Karvetnagar*[3] a similar question arose for consideration. There, a mortgagee assigned a decree obtained for principal mortgage amount and interest due to him. He was in possession of the mortgage property. But there was no provision in the decree for taking accounts of the profits which the mortgagee might receive after the date of the decree. When he attempted to execute the decree for realisation of the principal and interest due to him, he was met with the plea that the amount which the decree-holder had realised as profits subsequent to the date of the decree should be ascertained and should be adjusted against the amount due under

1. (1910) I.L.R. 43 Mad. 476.
2. (1925) 50 M.L.J. 547 : I.L.R. 49 Mad. 716.
3. (1915) 29 M.L.J. 219.

the decree. This plea was sought to be repelled by the contention that such adjustment had not been reported to the Court under Order 21, rule 2. The Bench relied upon the averment in the Execution Petition itself to hold that the decree-holder had reported receipt of such moneys. There the decree-holder had stated in his E.P. that though he had received money as profits from the mortgage properties and though he would be liable to adjust this amount against the decree, it could be done in separate proceedings. This the Court held was a sufficient compliance with Order 21, rule 2, Civil Procedure Code, and directed the Executing Court to ascertain the amount so realised by the decree-holder. Following the same principle, in this case, there can be no bar of Order 21, rule 2, Civil Procedure Code, since in the Execution Petition itself the decree-holder has reported that the panchayatdars had met and divided the properties though they added a qualification that the division was not completed. We have not been given any indication as to whether the completion spoken of was in respect of any one of the items of properties involved in the suit or in respect of all the properties involved in the suit. It certainly is a report to Court as regards the division of the immoveable properties.

The question remains, however, for the lower Court to decide, namely, how far the division pleaded by the present appellant was a division effected by the panchayatdars. That question, as a question of fact, has not been decided by either of the lower Courts.

The orders of both the lower Courts are therefore set aside. The Execution Petition will be restored to file by the trial Court and it will go into the question of the truth of the partition of the properties pleaded by the present appellant. If the lower Court is satisfied about the truth of that partition, there will be nothing more to be done in that proceeding but to dismiss the E.P. If, however, the trial Court is not satisfied about the truth of the partition pleaded by the appellant but is satisfied that no partition was effected by the panchayatdars, it would be open to the lower Court to appoint a Commissioner to divide the properties. There will be no order as to costs.

V.S. ——— *Appeal allowed. Matter remitted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE GANAPATIA PILLAI.

N. Vajrapuri Naidu and another .. *Appellants**

v.

The New Theatres Carnatic Talkies Ltd., a Joint Stock Company having its registered office at Coimbatore .. *Respondent.*

Madras City Tenants Protection Act (III of 1922) *as amended by Act (XIX of* 195-), *sections* 3, 9 *and* 12—*Constitutional validity—If offend Articles* 19 (1) (*f*), 19 (5) *and* 31 (2) *of the Constitution—Scheme of the Act.*

The right given to a tenant under the Madras City Tenants Protection Act to acquire the land in his occupation is irrespective of considerations like the area of the land, the period or the purpose of the lease or the size or character of the building put up by the tenant. The contractual rights between a landlord and his tenant are not interfered with by the provisions of the Act till either a suit for ejectment is instituted by the landlord or a decree for that purpose is obtained. On the happening of this contingency two rights are conferred on the tenant, *viz.*, first to obtain compensation for the building under section 3 and second the right to purchase the land on payment of its value under section 9 of the Act. Section 9 of the Act is not opposed to Article 19 (1) (*f*) or (5) of the Constitution of India. Having regard to the history and object of the Act, the legislation is intended to advance public benefit and convenience and it does not offend against Article 31 (2) of the Constitution of India.

The Proviso to section 12 of the Act should be limited to those cases where the stipulation in the contract regarding erection of building relate to facts such as the size, the cost, the design of the building and such other cognate matters. To construe the Proviso to mean that a landlord could stipulate with the tenant prohibiting him from erecting any building on the land will abrogate the very protection given under the section to the tenants.

The word ' building ' in section 2 (1) of the Act will include business premises, and dwelling houses and would include a building like a cinema-theatre.

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*L.P. A. No. 75 of 1958. 24th April, 1959.

Appeal under clause 15 of the Letters Patent against the Order of the Hon'ble Mr. Justice Panchapakesa Ayyar, dated 28th July, 1958 and made in C.M.P. No. 1835 of 1958 in A.S. No 255 of 1957 presented under section 9 (1) of the Madras City Tenants Protection Act of 1921 as amended by Act (XIX of 1955) to direct the respondent therein to sell the suit land in O.S. No. 76 of 1956 on the file of the Court of the Subordinate Judge of Coimbatore, for a price to be fixed by this Court.

G. R. Jagadisan, V. S. Ramakrishnan and *P. S. Ramachandran*, for Appellants.

The Advocate-General (*V. K. Tiruvenkatachari*), *R. G. Rajam* and *T. Ramakrishna*, for Respondent.

The Additional Government Pleader (*K. Veeraswami*) on behalf of the State.

The Order of the Court was delivered by

Ganapatia Pillai, J.—This Letters Patent Appeal is directed against the judgment and order of Panchapakesa Ayyar, J., in C.M.P. No. 1835 of 1958 in A.S. No. 255 of 1957 on the file of this Court. The appellants before us were the respondents in the petition, and The New Theatres Carnatic Talkies Ltd., the respondent before us, was the petitioner in that proceeding. That was an application made under section 9 (1) of the Madras City Tenants Protection Act (III of 1922), as amended by Madras Act (XIX of 1955), to direct the appellants before us to sell to the respondent the land on which the theatre constructed by the respondent stands.

The facts which led up to the appeal in the High Court and the application for a direction to sell the land are the following. A piece of vacant land situate within the limits of Coimbatore Municipality belongs to the appellants, who are mother and son. They granted a lease of the property to one Abhirama Chettiar by a registered lease-deed dated 19th September, 1934, for a period of 20 years. It was provided in the lease-deed that, on the expiry of the twenty-year period, the lease could be renewed for a further term of 20 years if the parties were so agreeable. It was also provided in the lease-deed that, on the expiry of the lease period, vacant possession of the land should be given to the lessor after removing any buildings which the lessee might construct thereon. On 17th April, 1937, Abhirama Chettiar assigned his interest in the leasehold for the unexpired portion of the lease period to the respondent before us, The New Theatres Carnatic Talkies Ltd. Even before that, there was a partnership between Abhirama Chettiar and the Managing Director of the Company, in pursuance of which a pucca cinema theatre was put up on the site in 1934-1935 at a cost of over 1½ lakhs. In March, 1954, the respondents issued a notice to the Company, asking them to quit the property and deliver vacant possession of the land. On receipt of this notice, the Managing Director of the Company started negotiations with the owners for the grant of a further lease for a period of 20 years. The case of the respondents is that a draft agreement of the proposed lease was drawn up, and the first appellant agreed to execute a fresh lease-deed in consultation with his mother. Subsequently he backed out of this agreement and filed a suit O.S. No. 76 of 1956 for recovering possession of the leased property with damages and future mesne profits. The Company, in its turn, instituted O.S. No. 264 of 1955, for specific performance of the contract to grant a further lease.

The First Additional Subordinate Judge of Coimbatore who tried both these suits together, dismissed the suit for specific performance, but granted a decree in the suit for eviction. The Company has preferred appeals against both decrees.

Against the decree for eviction, the Company preferred A.S. No. 255 of 1957, in this Court, during the pendency of which, by G.O. No. 608, Revenue, dated 10th February, 1958, the Government of Madras extended the Madras City Tenants Protection Act to the municipal town of Coimbatore. Within the period of 30 days provided in the Act, the Company applied before Panchapakesa Ayyar, J., for an order under section 9 (1) of the said Act to compel the landlord to sell the site to the Company for a price to be fixed by the Court and offered to pay the full market value.

Numerous objections were raised before Panchapakesa Ayyar, J., but he overruled all of them and held that the respondent Company was entitled to purchase the

site under section 9 of the Act on paying the full market value, as undertaken by them. He directed the Subordinate Judge, Coimbatore, to appoint a Commissioner to fix the value of the site based on the market value prevalent on 28th July, 1958, the date of his order ; and he also gave an order, directing the appellants before us to execute a sale-deed for the site in favour of the respondent Company on payment of the market value of the site fixed by the lower Court. He further directed that, as soon as his order became final, the appeals preferred against the two decrees in the two suits mentioned above will stand dismissed.

Two questions have been raised by Mr. G.R. Jagadisa Ayyar, learned counsel for the appellants in this appeal. First, he attacks the constitutional validity of the provision in section 9 (1) of the Madras City Tenants Protection Act, hereinafter referred to as the Act as infringing Article 19 (5) and violating Article 19 (1) (*f*) and Article 31 (2) of the Constitution. Before discussing the merits of this contention, we would set out in brief the provisions of the Act. Sections 3, 9 and 12 are the important sections which matter. Sections 3 and 12 of the Act provide that, except in cases where a tenant of land has first bound himself by stipulations in-writing registered as to the erection of buildings and then erected the building on the land taken on lease by him, every tenant who has erected such a building shall have the right to recover compensation equal to the value of the building when the landlord seeks to eject him from the land. By section 9, the tenant is given an option to acquire the land from its owner for the lowest market value prevailing within the next preceding seven years. This provision as to the lowest market value prevalent within seven years preceding the date of the order of Court enabling the tenant to purchase the land was introduced by an amending Act, Act VI of 1926. The time fixed for the tenant to apply for the purchase of the landlord's interest is one month after the date when the original Act or amending Act as the case may be, came into force or within one month after the service on him of summons in a suit by the landlord for the eviction o the tenant. By the amending Act, Act VI of 1926, the period of one month after the date of the original Act coming into force was substituted by the same period after the date when the amending Act was extended to a municipality by Government Order. Sub-section (2) of section 9 gives power to the Court to extend the time for payment of the price fixed by it for the land and also to make an order for payment of the amount in instalments. Sub-section (3) of that section enables the Court to pass a final order, directing the conveyance of the land by the landlord to the tenant on payment of the price fixed. The consequence of this order is that the suit for ejectment instituted by the landlord should stand dismissed, or that any decree or order in a judgment that might have been made in such a suit already obtained by the landlord should be vacated. It will be seen from the provisions of the Act summarised above that the right given to the tenant to acquire the land is irrespective of any consideration like the area of the land, the period or the purpose of the lease or the size or character of the building put up by the tenant. Indeed, even if the tenant had erected the building without or against the consent of the landlord, the Act would appear to permit the tenant to acquire the land. The contractual rights between the landlord and the tenant are not interfered with by the provisions of the Act till either a suit for ejectment is instituted by the landlord or a decree for that purpose is obtained. On the happening of this contingency two rights are conferred upon the tenant : first, payment of compensation for the building under section 3 and, second, the right to get an order from the Court, directing the landlord to sell the land to him on payment of its price under section 9.

The attack upon the validity of the impugned Act is not based upon the right to compensation. It is directed only against the right of compulsory acquisition of the land through the instrumentality of the Court. It is said that this right conferred upon the tenant is a restriction upon the right of the landlord to recover possession of his land. Incidentally, this restriction is said to be an infringement of the right of ownership of the landlord. Secondly and alternatively it is contended that the provision for compulsory sale of the land to the tenant when the landlord seeks to evict the tenant is a deprivation of the property of the landlord and it is not valid under Article 31 (2) of the Constitution, since there is no public purpose involved.

We will take up first the argument based upon Article 19 of the Constitution. It is said that section 9 violates Article 19 (1) (*f*) when it restricts the right of the owner to evict the tenant and infringes Article 19 (5) in that this restriction is not a reasonable restriction. The argument was that, even if the acquisition by the tenant was lawful and was not hit by Article 31 (2) of the Constitution, the landlord is entitled to rely on Article 19 (1) (*f*). The relative scope of Article 19 and Article 31 of the Constitution is now well settled according to the decisions of the Supreme Court in *State of West Bengal* v. *Subodh Gopal Bose*[1] and *Dwarakadas Shrinivas of Bombay* v. *Sholapur Spinning and Weaving Co., Ltd.*[2] In the former case, the question arose thus. A purchaser of an entire touzi at a revenue sale held by the Collector acquired, under section 37 of the Bengal Revenue Sales Act XI of 1859, the right to avoid and annul under-tenures and forthwith to eject all under-tenants with certain exceptions. This right was sought to be taken away from the purchaser by the West Bengal Amendment Act, 1950, on the ground that the exercise of this right caused great hardship in the urban areas of Calcutta and its suburbs. The constitutional validity of the West Bengal Amendment Act was questioned on the ground that it violated the fundamental right of the citizen to hold property under Article 19 (1) (*f*) and this objection was upheld by the Calcutta High Court. In rejecting this contention, the Supreme Court held that the provisions of Article 19 could only apply where the citizen continues to hold the property. They pointed out the correlation between Article 19 (1) (*f*) and Article 31 in the following manner. If a person loses his property by reason of its having been compulsorily acquired under Article 31, he loses his right to hold that property and could not complain that his fundamental right under Article 19 (1) (*f*) has been infringed. In other words, the rights enumerated in Article 19 (1) subsist only when the citizen has the legal capacity to exercise them. The Supreme Court referred to the decision in *A. K. Gopalan's case*[3] in support of the conclusion in that case that the fundamental right to personal liberty could only be enjoyed by a free citizen and not by one who was subject to lawful duress. This conclusion as to the relative scope of Article 19 (1) (*f*) and Article 31 was reiterated by the Supreme Court in *Dwarakadas Shrinivas* v. *Sholapur Spinning and Weaving Co., Ltd.*[2] The result is that if the application of the impugned Act deprives the landlord of the property by compulsorily acquiring it from him for the benefit of the tenant, Article 19 (1) (*f*) cannot come into play.

Mr. Jagadisa Ayyar sought to counter this conclusion by contending that the right of optional acquisition of the landlord's interest conferred upon the tenant really a restriction upon the right of the landlord to recover possession of his land. This right, though optional with the tenant, comes in play as soon as the tenant applies under section 9 (1) to the Court for an order for acquisition. It is true that, at this point of time, the landlord had only asserted his right to recover possession of his land. But, in judging the effect of the provisions of section 9 of the impugned Act, one has to take into account the result of the application made by the tenant for acquisition. So viewed, we do not find any justification for holding that the order for acquisition made under section 9 is only restriction upon the right of the landlord to recover possession of his land and not deprivation of the title of the landlord to the land.

What amounts to deprivation of property has been the subject of determination by the Supreme Court in many cases arising under Article 31 of the Constitution. It is enough for our present purpose to refer to the observations of the Supreme Court in *Dwarakadas Shrinivas* v. *Sholapur Spinning and Weaving Co., Ltd.*[2] There, power was taken by the provisions of the Sholapur Spinning and Weaving Company Emergency Provisions) Act (XXVIII of 1950) for appointing Directors to take over the assets and management of the Company, and, when this power was exercised by the Government, objection was taken to the validity of the Act. One of the arguments advanced by the learned Attorney-General as a reply to this objection is that the

1. (1954) S.C.J. 127 : (1954) S.C.R. 587.
2. (1954) S.C.J. 175 : (1954) 1 M.L.J. (S.C.) 355 : (1954) S.C.R. 674.
3. (1950) S.C.R. 88 : (1950) S.C.J. 174 : (1950) 2 M.L.J. 42 (S.C.).

title of the Company to its assets was left intact and was not taken over by the Government under the Act, and ther fore, the Act did not authorise any acquisition of the company or its assets. In repelling this argument, Mahajan, J., as he then was, made the following observations :

" In this situation, it is not possible to subscribe to the contention of the learned Attorney-General that the effect of the ordinance is that the Central Government has taken over the superintendence of the affairs of the company and that the impugned legislation is merely regulative in character. In the present case, practically, all incidents of ownership have been taken over by the State and all that has been left with the Company is mere paper ownership".

Even on that hypothesis, the Supreme Court held that the provisions of the impugned Act deprived the Company of its property. What is substantial deprivation of property that would come under Article 31 was also considered by the Supreme Court in *State of Bombay* v. *Bhanji and Munji and another*[1]. There, the following quotation from *Dwarakadas Srinivasa's case*[2], was reproduced for reinforcing the conclusion that, when a right to occupy the premises by a tenant is taken away, as also the right to transfer, assign, let or sublet, what is left to him is merely the husk of title in the leasehold interest, and the law which authorises such taking away of the right of the tenant (The Bombay Land Acquisition Act, 1948) effected a substantial deprivation of the right of the tenant, namely, his right to property.

" By substantial deprivation is meant the sort of deprivation that substantially robs a man of those attributes of enjoyment which normally accompany rights to, or an interest in, property. The form is unessential. It is the substance that one must seek ".

In view of all this, we are unable to countenance the argument that the acquisition of the landlord's title under section 9 of the impugned Act does not amount to deprivation. Indeed, not even paper title is left with him. He parts with ownership in return for payment of a market price. Under the circumstances, Article 19 (1) (*f*) cannot have any application to this case. In this view, it is really unnecessary for us to discuss the further question whether the provisions of the impugned Act exceed the limit of reasonable restrictions indicated in Article 19 (5) and whether the object of the Legislature could not have been achieved by making the tenancy permanent or making the eviction of the tenant impossible for a period till housing conditions improved. The further argument that the provisions of the Act are really in excess of the necessities of the situation and that the remedy proposed by the impugned Act is not commensurate with the evil sought to be avoided does not also arise for our consideration.

The first argument addressed to us by Mr. G.R. Jagadisa Ayyar relating to Article 31 (2) is that Article 31 relates only to acquisition made by the State in the sense that the property taken belongs to the State or that the State takes t in the first instance and, acting as a cond it pipe, transfers it to some of its citizens. In the present case, the State does not take the property of the landlord. The impugned Act merely directs the landlord to convey his land to the tenant who has built a building upon it. Not only is there no authority for this contention of Mr. Jagadisa Ayyar, but the Supreme Court has laid down that Article 31 applies not only to acquisition by the State in the sense of the property becoming thereafter State property, but also to acquisitions made under the provisions of any law for any class of persons. In *State of Bombay* v. *Bhanji and Munji and another*[1], the acquisition was not for the benefit of the State, though, after acquisition, the State took power to allot the premises either to its servants or to others. In the various laws enacted by the States after 1948 for acquisition of zamindari estates, acquisition was not made by the State itself for its benefit, but was made really for the benefit of the tenants of the zamindars. None of these laws was held by the Supreme Court to fall outside Article 31.

In support of his argument that Article 31 applied only to acquisitions by the State and not on behalf of any section of the public, Mr. Jagadisa Ayyar referred to section 31(2) (*a*) as indicating the class of acquisitions, to which section 31 would

1. (1955) S.C.J. 60 : (1955) 1 M.L.J. (S.C.) 19 : (1955) 1 S.C.R. 777.

2. (1954) S.C.J. 175 : (1954) 1 M.L.J. (S.C.) 355 : 1954 S.C.R. 674.

apply. He really used this argument to buttress up his plea that Article 19 (1) (*f*) alone would apply to this case. Article 31 (2) (*a*) was introduced by the Fourth Amendment to the Constitution which was made in 1955 in order to nullify the effect of the decision of the Supreme Court in *Dwarakadas Shrinivas case*[1], (Seco .d Sholapur Ca e). This new clause provides, that when the State takes private property, no compensation need be paid unless ownership also is transferred to the State. No more need be said about the merits of this contention in view of the decisions of the Supreme Court regarding the applicability of Article 31 of the Constitution to all kinds of deprivation of property, whether the property is taken over by the State or is acquired for the benefit of a section of the public.

The next contention of Mr. Jagadisa Ayyar was that the taking in this case was not for a public purpose and therefore was not protected by Article 31. The learned Advocate-General, appearing for the respondent, did not dispute that any acquisition to be protected by Article 31 should be for a public purpose. The narrow question for our consideration, therefore, is whether the purpose for which the acquisition is provided under the impugned Act is a public purpose.

In *State of Bombay* v. *Aligulshan*[2], the Supreme Court had to consider whether a public purpose was involved in the taking contemplated under the Bombay Land Acquisition Act, 1948. Under that Act, the State of Bombay was empowered to requisition premises for certain purposes. The premises in question in that case was requisitioned for housing a member of the staff of a Foreign Consulate. In discussing the question whether this was a public purpose, the Supreme Court pointed out that a purpose may not be a ' State purpose ' or a ' Union purpose ', and yet fall under the category of general public purpose. It upheld the validity of the Act on the ground that the requisition of the premises for the purpose of housing a member of a Foreign Consulate was a general public purpose.

This question has also been considered in a number of decisions both of this Court and of the Supreme Court. In *Thambiran* v. *State of Madras*[3], to which one of us was a party, there is an exhaustive review of all the case-law on the subject. There, land was acquired by the State on behalf of a co-operative society for building houses for the members of the Society. The contention urged was that such a purpose would not be a public purpose. The Bench summed up the result of the authorities thus :—

" Acquisition of property for public purpose under Article 31 (2) includes whatever results in an advantage to the public. It is not necessary that it should be available to the public as such. It might be in favour of individuals, provided they are benefited, not as individuals, but in furtherance of a scheme of public utility. Schemes for the construction of houses, for clearing slum areas, relieving congestion and housing poor people are for a public purpose, as they tend to promote social welfare and prosperity ".

In *State of Bombay* v. *Bhanji and Munji*[4], the Supreme Court held that the powers vested in the State of Bombay under the Bombay Land Acquisition Act, 1946, authorised acquisition of premises for a public purpose, namely, finding accommodation for the homeless. The fact that the term 'public purpose' has not been defined in the Constitution has enabled Mr. Jagadisa Ayyar to cover a wide field during his argument on this point and he has also referred to the old American view of the law of eminent domain, which authorised the State to take private property for public use. Indeed, that view which imposed the condition that the public must actually have an interest in the property acquired and that the terms and manner of enjoyment must be within the control of the State has been very much modified in modern times even in America, as would be seen from the following quotation from Rottschaeffer's 'Constitutional Law,' 1939 edition, at pages 700-701:

" The principle has considerably modified the scope of the well-established rule that the power of eminent domain may not be used, primarily to transfer private property from one owner to another

1. (1954) S.C.J. 175: (1954) 1 M.L.J. (S.C.) 355: 1954 S.C.R. 674.
2. (1955) S.C.J. 822: (1955) 2 S.C.R. 867.
3. (1952) 2 M.L.J. 298: I.L.R. 1952 Mad. 982.
4. (1955) S.C.J. 60 : (1955) 1 M.L.J. (S.C.) 19: (1955) 1 S.C.R. 777.

for the private use of the latter. But it has not completely abolished that rule. Every condemnation of property by a private party for use by him, necessarily involves its exercise for his private benefit. It is only where his use of it either involves, as well as its use by the general public, that the property is deemed taken for a p oper public use. It is invariably a question of degree whether the public benefits resulting from a private use of condemned property, are sufficiently important to outweigh the private benefits derived therefrom by the condemnor."

As early as 1914 in *Hemabai* v. *Secretary of State for India*[1], the Privy Council had to consider this question with reference to a sanad granted by the East India Company by way of lease of a land situate in the island of Bombay. The terms of this lease granted power to the company, their successors or assigns, to resume the land for any public purpose. The Government of Bombay purported to exercise this power in order to erect dwelling houses for Government officials. This was challenged on the ground that the purpose was not a public purpose. The Privy Council overruled this objection on the ground that the provision of houses for Government officials would redound to public benefit by helping the Government to maintain the efficiency of its servants. On this ground, they held the purpose to be a public purpose.

Mr. Jagadisa Ayyar cited the decision of the Orissa High Court in *Satrughna Sahu* v. *State of Orissa*[2], on this point. By the provisions of the Orissa Act XVII of 1948, the Government took powers to acquire land for certain purposes which were designated as Development of Industries, Irrigation, Agriculture, Capital Construction and Resettlement of Displaced Persons. By virtue of these powers, the Orissa Government notified the establishment of a paper-mill in the District of Cuttack by a private limited company as falling within the development of industries as defined in the said Act. Thereafter, the Land Acquisition Officer took steps to acquire lands for this company. This acquisition was impugned on the ground that it was not for a public purpose and the acquisition would offend Article 31 (2) of the Constitution. The Bench of the Orissa High Court, which heard this case, held that, even in its extended meaning of the term ' public purpose ', it was not intended to apply where the land is required for an industrial concern working purely for its own gain, even though the goods produced by the concern may be of use to the general public. On this analogy, Mr. Jagadisa Ayyar contended that the acquisitions under the impugned Act, with which we are concerned, are really for the benefit of the private individuals who have constructed houses upon lands belonging to others and could not be held to be for a public purpose. In rejecting this argument, we rely upon the principle laid down by a Bench of this Court, to which one of us was a party, in *Gundachar* v. *State of Madras*[3]. There, a land was acquired under the Land Acquisition Act for excavating a field distributory channel to irrigate an adjouining dry land belonging to a private owner. The objection taken to the acquisition was that the land was acquired solely for the benefit of a private owner and could not, therefore, be deemed an acquisition for a public purpose. The Bench repelled this argument, following the decision in *Thambiran* v. *State of Madras*[4]. The following quotation from the *State of Bihar* v. *Maharajadhiraja Sir Kameswar Singh*[5], was relied on as being apposite :

"The definition of the expression ' public purpose ' is elastic and takes its colour from the statute in which it occurs, the concept varying with the time and state of society and its needs."

The Bench pointed out the principle of American Constitutional Law that there was a public use if a thing taken is useful to the public. They further point out that under the rule applicable under the American Constitutional Law it was not necessary for the benefit to be for the whole community, but it should be for a considerable number and the fact that the benefit also enures to a private individual was no objection. The acquisition in that case was justified on the ground that its object was extension of irrigation, though incidentally it benefited only one private individual. On this state of the law, the following propsitions cannot be questioned ; an acquisition can be for a public purpose, even though all the members of the public

1. (1914) L.R. 42 I.A. 44 : 28 M.L.J. 179.
2. A.I.R. 1958 Orissa 187.
3. (1953) 1 M.L.J. 262 : I.L.R. 1953 Mad. 551.
4. (1952) 2 M.L.J. 258 : I.L.R. 1952 Mad. 982.
5. (1952) S.C.J. 354 : 1952 S.C.R. 889.

do not take the benefit, but only a section of it takes benefit ; public purpose in an acquisition may be served even though the acquisition is for the benefit of particular members of the public, provided the object of the acquisition advances a public purpose. In this category, may be included advancement of public prosperity, public welfare and the convenience of the public.

Having these principles in mind, we shall examine the purpose for which the acquisition is made under the impugned Act. The Preamble to the Act states that it was found necessary to give protection to tenants who had constructed buildings on lands belonging to other people in the hope that they would not be evicted so long as they paid a fair rent for the land. It is well known that, in 1921, at the time when the impugned Act was placed in the statute book, quite a number of citizens of the City of Madras had put up buildings on lands belonging to others obtained on lease ; and attempts were made by the landlords to evict those tenants by demolition of such buildings for the purpose of taking vacant possession of the land. This created a problem of finding accommodation for the displaced tenants and also of abating the inconvenience caused to such tenants by the destruction of the valuable buildings put up by them. A situation was thus created in which a section of the public were in danger of being rendered homeless, and the State had the duty of finding homes for them. This being the history of the object behind the legislation, there can be no doubt that public benefit and convenience were advanced by the impugned Act. No exception could therefore be taken on the ground that the impugned Act benefited only a section of the public, because, indirectly, the general public also was benefited by easing the situation of housing conditions in the city. The same conditions had developed in the municipal towns of this State by 1955 when the Amending Act XIX of 1955 was enacted, extending the provisions of the impugned Act to municipal towns and adjoining areas in the State of Madras. No exception could, therefore, be taken to the validity of the Act on the ground that the taking of private property authorised by the Act did not serve a public purpose.

An attempt was made by Mr. Jagadisa Ayyar to draw an analogy between pre-emption laws in force in the various States of India, which have been held in a decision of the Hyderabad High Court and another decision of the Rajasthan High Court as invalid. There is no decision of the Supreme Court on the validity of the pre-emption laws of the various States ; but different High Courts like the Nagpur High Court, the Punjab High Court and the Allahabad High Court have had to deal with this question. In *Panch Gujar Gaur Brahmans* v. *Amarsingh*[1], *Siremal* v. *Kantilal*[2], and *Shankarlala* v. *Poonamchand*[3], three Benches of the Rajasthan High Court had to deal with the validity of the laws of pre-emption prevailing in that State. Articles 14 and 19 (1) (*f*) of the Constitution were relied on for holding that the laws were invalid. In our opinion, no useful purpose will be served by canvassing the reasons given in these decisions as there is no similarity between the incidence of the law of pre-emption and the acquisition of property under the impugned Act. Indeed, a different view had been taken in *Ramachandra* v. *Jannardhan*[4], *Uttam Singh* v. *Kartar Singh*[5], and *Abdul Hakim* v. *Jan Mohamed*[6]. In all these cases, the law of pre-emption was upheld as the restriction was held to be a reasonable restriction within the meaning of Article 19 (5) of the Constitution. Both on the ground that there is no parity between the law of pre-emption and the impugned Act and on the ground that there is no decision of the Supreme Court which is binding on us, we consider there is no substance in this contention.

The next argument of Mr. Jagadisa Ayyar related to the Proviso in section 12 of the impugned Act. That section reads :—

"Nothing in any contract made by a tenant shall take away or limit his rights under this Act, provided that nothing herein contained shall affect any stipulation made by the tenant in writing

1. A.I.R. 1954 Raj. 100.
2. A.I.R. 1954 Raj. 195.
3. A.I.R. 1954 Raj. 231.
4. A.I.R. 1955 Nag. 225.
5. A.I.R. 1954 Punjab 55.
6. A.I.R. 1951 All. 247.

registered as to the erection of buildings in so far as they relate to buildings erected after the date of the contract."

The argument based upon the Proviso to this section is that the contract in this case stipulated that, at the end of the lease period, the tenant should give vacant possession to the landlord after removing the building constructed by him upon the land. The effect of this stipulation in the contract, according to the learned counsel, was that the tenant impliedly contracted himself out of the rights conferred upon him by the impugned Act. The effect of this Proviso has been considered by Pandrang Row, J., in *Vedavalli Thayarammal* v. *Junus Chettiar*[1]. The point for decision in that case was whether a tenant, against whom a suit for ejectment was laid, was entitled to plead want of notice stipulated by section 11 of the impugned Act as a bar to the claim for eviction. For this purpose, it was assumed that the buildings in occupation of the tenant did not b long to him, but were in existence even before the date of the tenancy. It became necessary to find out if a person in the position of the defendant in that case fell within the definition of the 'tenant' contained in the impugned Act. The tenancy in that case came into existence before the date of the Act. The land was used for carrying on the business of a firewood depot. The plaintiff claimed the building as her own on the strength of a rental agreement of 1922, which provided that the tenant should, at the end of the lease period, vacate the building and the ground and deliver the same to the landlord. This stipulation was relied on as a bar to the claim of the tenant for taking benefits under the Act. In considering the scope of the Proviso in section 12 of the Act, Pandrang Rao, J., observed thus :—

"This proviso cannot possibly apply to the present case. In the first place, though the stipulation purports to relate to buildings to be erected after the date of the contract, there can be no doubt that the buildings were already in existence and that the stipulation is now being attempted to be applied to buildings in existence before the date of the contract relied on. S condly, the proviso applies, in my opinion, only to stipulations regarding the erection of buildings that is to say, stipulations restricting the right of the tenant to building such buildings as he likes either as regards the size, their cost, their situation and so on, and it certainly cannot relate to stipulations cutting down or extinguishing altogether the right of the tenant to get compensation in respect of buildings built by him, which is given to him by the Act."

The learned Judge concluded that the stipulation in the contract did not deprive the tenants of anything, which, but for that agreement, they would have been entitled to under the Act. The first conclusion of the learned Judge that the stipulations in the contract as regards buildings applied to buildings already in existence is not relevant for our present purpose. It is his second conclusion which is canvassed by Mr. Jagadisa Ayyar as incorrect. The tenancy agreement in this case recites that the tenant obtained the leasehold right for the purpose of erecting a theatre thereon. Of course, there is also the agreement that, at the end of the lease-period, the tenant should surrender possession of the land to the landlord after vacating the building erected by him. The first part of section 12 is in absolute terms. It categorically states that nothing contained in any contract made by a tenant shall have the effect of taking away or limiting his rights under the impugned Act. The Proviso is in the nature of a qualification to the first part of the section. The proviso, no doubt, states that, notwithstanding the first part of the section, a tenant shall be bound by stipulations made by him as to the erection of building, in so far as they relate to buildings erected after the date of the contract. To construe this Proviso in the manner suggested by learned counsel for the appellants would lead to the result of abrogating the protection given to the tenant by the first part of this section. We are not concerned here with a case of erection of buildings contrary to the stipulations contained in the written contract, to which the tenant was a party. How far, in such a case, the tenant would be be protected from forgoing his rights under the impugned Act does not arise for our consideration. For example, we may point out that, in a case, a tenant might have agreed to erect a building of a certain size and of a certain value, and he might in contravention of this undertaking, erect a building of another size or of a higher value. Whether in such a case he could claim

1. (1936) 44 L.W. 554.

compensation for the entire building or whether he should restrict his right to compensation to the permitted building under the language of the contract is not the question which arises for our consideration now. It is true that section 9 says that a tenant entitled to compensation could alone purchase the land belonging to the landlord. But the question is whether in the hypothetical case posited by us now, the tenant could put up an unauthorised building in the sense that the building contravened the stipulations contained in the contract and whether a tenant who had so put up an unauthorised building in terms of the stipulation in the contract would fall within the definition of a 'tenant' entitled to compensation as that term is used in sections 3 and 9 and whether such a tenant could acquire the landlord's title in the land. These questions do not, however, arise for our consideration, now. The limited question we are called upon to decide is whether, when the building put up conforms to the stipulations contained in the registered contract between the parties as to the erection of the building, the tenant would forfeit his right of acquiring the landlord's title under the Act by reason of the term in the contract as to surrender of vacant possession. For thus construing section 12, the words

"any stipulation made by the tenant in writing registered as to the erection of building must be held to include not only the size and nature of the building, but the very question of the tenant's right to erect the buildings."

Such a construction of the Proviso would exceed the purpose of the Proviso. The object and purpose of every proviso in an enactment is not to destroy the general proposition to which it is a qualification but to limit the operation of the general proposition. The general proposition in this case contained in section 12 is that no term in any contract made by a tenant shall take away his rights or limit his rights under the Act. We are not concerned with a right to compensation in this case. We are only concerned with the right of acquisition of the land by the tenant. Such a right would not be taken away or limited by the stipulation made by the tenant in the contract that he would give vacant possession of the land at the expiry of the lease period. This condition in the contract cannot be regarded as a condition or stipulation as to the erection of buildings. Mr. Jagadisa Ayyar contended that this stipulation impliedly trenched upon the erection of a building, because, the tenant agreed to remove the building at the end of the lease period. Not only is this construction far-fetched, but it is also opposed to the plain grammatical meaning of the Proviso. In our opinion, the application of the Proviso should be limited to those cases where the stipulations in the contract relate to erection of building such as the size of the building, the cost of the building and the design of the building or other cognate matters. This construction was characterised by Mr. Jagadisa Ayyar as one which involved introduction of words which are not found in the section. We do not agree. To accede to the contention of Mr. Jagadisa Ayyar would amount to abrogation of the valuable rights secured to the tenant under section 12. We, therefore, overrule this contention.

Getting inspiration from an observation which fell from one of us, Mr. Jagadisa Ayyar lastly contended that the cinema theatre, with which we are concerned in this case, would not fall under the definition of 'building' contained in section 2 (1) of the Act. The definition reads thus :

" Building includes a house, outhouse, stable, latrine, shed, hut and any other such structure whether of masonry, bricks, wood, mud, metal, or any other material whatsoever."

This argument is answered by the decision in *Vedavalli Thayarammal* v. *Junus Chettiar*[1] with which we are in respectful agreement. There, the building in question was used as a firewood depot, and was not a dwelling house. Pandrang Row, J., held that the definition of the word 'building' found in the Act was sufficient to include both business premises as well as dwelling house. Besides, the use of the word 'includes' in the definition in section 2 (1) of the Act, shows that it is not an exhaustive definition. It could not be construed as a word of restriction. It should be properly construed as a word of enlargement. The term 'includes' is defined in Stroud's Judicial Dictionary, Volume 2, as a phrase of extension and not of restrictive definition. We would, there-

1. (1936) 44 L.W. 554.

fore, agree with Pandrang Row, J., that the definition of a 'building' in section 2 (1) of the Act includes a building like the cinema theatre in the present case.

All the objections raised by the appellant, therefore, fail, and the appeal is dismissed. No costs.

R.M. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE GANAPATIA PILLAI.

P. R. Narayanaswami Iyer .. *Appellant**

v.

Union of India, by General Manager, Southern Railway .. *Respondent.*

Railways Act (IX of 1890), *sections* 77 *and* 80—*Scope and effect of—Notice of claim for loss or damage to goods—Goods consigned carried over several railways—Whether separate notices should be issued to each of the railway administrations—Section* 80—*If should be read with section* 77.

Civil Procedure Code (V of 1908), *section* 80—*Notice under—Railway carriers—Need for two notices, one under Railways Act and another under Civil Procedure Code.*

Statutory notices to Government found in various enactments are only matters of procedure and are not matters of substantive rights. Section 77 of the Railways Act containing the rule as to notice of claim for loss or damage to goods consigned is one such provision. The liability of the Government as owning the several railway administrations is not a liability created by the Railways Act but arises only in contract, subject to such limiting factors that are contained in the Railways Act. In its activity in running the railways the Government has not created any separate legal entities, capable of being sued against apart from the Central Government. Section 80 of the Railways Act does not have the effect of creating any such entities and the rule as to notice in Section 77 of the Act has no relevance to the scheme of liability enacted in Section 80 of the Act.

In cases of through traffic where the goods consigned is carried over several railways, one notice to the General Manager of any one of the railways concerned in the route over which the through traffic passed would be sufficient compliance with section 77 of the Railways Act. The section also does not lay down that such notice should be given to any particular railway administration such as the contracting railway or destination railway, etc.

Kishanlal Roopchand & Co. v. *Indian Dominion*, (1955) 1 M.L.J. 79, overruled.

The Governor-General in Council v. *Ajith Bai Jayantilal*, (1952) 2 M.L.J. 24, referred and explained.

Section 77 of the Railways Act does not require that notice of claim for loss or damages should be given to every one of the General Managers of the different railways over which a through traffic occurs. The section contemplates only one notice and such a notice could be given to the General Manager of any one railway.

The question of notice under section 80, Civil Procedure Code, has no bearing on the liability of the Central Government in relation to the railways run by it and it could not govern the scope and application of section 77 of the Railways Act. The amendment of section 80, Civil Procedure Code, in 1948, inserting a special provision as to notice in case of railways could not have any effect on the question of liability of the Government, who now owns the several railway administrations after amalgamation.

Per Curiam.—It is desirable that the Central Government should undertake legislation dispensing with notice under section 80, Civil Procedure Code, in a case where notice under section 77 of the Railways Act has been given and also clarify as to, to which railway administration such a notiec should be given in cases where through traffic passes over more than one railway administration of the Government.

Appeal against the Decree of the District Court of Tiruchirapalli in A.S. No. 183 of 1953 preferred against the Decree of the Court of the Subordinate Judge of Tiruchirapalli in O.S. No. 261 of 1951.

R. Gopalaswami Ayyangar, P. S. Srisailam, V. Ratnam and *V. S. Ramakrishnan*, for Appellant.

M. S. Venkatarama Ayyar and *T. Krishnaji*, for Petitioner in C.R.P. No. 433 of 1956.

* S. A. Nos. 1008 of 1955 and 394 of 1956. (C.R.P. No. 433 of 1956.)

16th April, 1959. (26th Chaitra 1881—Saka).

K. Rjah Ayyar and *S. S. Ramachandra Ayyar*, for Respondent.

The Judgment of the Court was delivered by

Ganapatia Pillai, J.—The two Second Appeals were referred to the Bench by Ramaswami, J., and the Civil Revision Petition was referred by Ramachandra Iyer J. in view of the conflict between the decisions in *Kishanlal Roopchand & Co.*, v. *Indian Dominion*[1] and *The Governor-General in Council* v. *Ajit Bhai Jayantilal*[2]. In the former case, Mack, J., took the view that in a case where a particular consignment of goods was carried over more than one railway, each railway administration should be treated as a separate entity and a separate juristic personality, and, though all the railways concerned were owned by the Government, a separate notice under section 77 of the Indian Railways Act should be given to each railway administration on the pain of the plaintiff failing to recover any compensation for loss of goods. In the other case, Basheer Ahmed Sayeed, J., took the view that, in the case of loss of a consignment carried over two Government railways, notice under section 77 given to one such railway which entered into correspondence with the other railway on the subject of the loss before the expiry of the period of six months mentioned in section 77 of the Indian Railways Act was sufficient notice. Which of these two views is the correct one is one of the points for our determination in these three cases.

The facts of these three cases are the following. In two of these three cases, suits were laid against the Union of India by the consginee of goods for recovery of compensation for the loss of goods. In the two Second Appeals, the lower appellate Courts have dismissed the suits, and in the Civil Revision Petition the Chief Judge of the Court of Small Causes, Madras, dismissed the suit against the Southern Railway, the first defendant, but granted a decree against the second defendant the Western Railway, and an application for new trial was successful and the suit was dismissed against both defendants.

In S.A. No. 1008 of 1955, the appellant-plaintiff, a merchant in Tiruchirapalli, had five bales of woollen lohies and 7 bales of cotton piecegoods consigned to him from Baroda and Ahmedabad respectively on 21st October, 1948 and 25th June, 1950, for delivery to him at Tiruchirapalli station. Out of the first consignement of five bales of woollen lohies, only four bales were delivered on 17th November, 1948. Since the fifth bale was not delivered, the plaintiff put in a claim for its value. In respect of the second consignment five bales alone were delivered to the plaintiff and the remaining two bales were not delivered. The plaintiff filed a suit against the Union of India represented by General Manager, Southern Railway, claiming the price of non-delivered goods comprised in both consignments.

The trial Judge held that the claim for the one bale of lohies included in the first consignment was barred by limitation; but as regards the claim for the two bales of piecegoods included in the second consignment, he gave a decree for their value. The appellate Judge reversed this decree, and dismissed the suit, holding that section 80 of the Railways Act applied to the case and that the suit against the Southern Railway administration should fail, because, the evidence disclosed that the Southern Railway which was not the contracting railway was not the railway on which the loss occurred.

The appellant in S.A. No. 394 of 1956 is a hides and skins merchant of Vaniyambadi. The respondent in this appeal is the Indian Union Government, represented by the General Manager, Southern Railway. The plaintiff was a consignee of 9 bags of sheep-skins, which were delivered to the Bengal Nagpur Railway at Nagpur railway station for being carried to Vaniyambadi on the Southern Railway on 11th October, 1951. The goods arrived at Vaniyambadi on 20th November, 1951, and because of the delay in transit, the goods were damaged and open delivery was taken. The Traffic Inspector assessed the damage at Rs.759-9-6, which was the sum claimed in the plaint as damages.

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1. (1955) 1 M.L.J. 79. 2. (1952) 2 M.L.J. 24.

One of the pleas raised was that the suit was bad for non-joinder of the contracting railway, namely, the Bengal Nagpur Railway, and consequently, the plaintiff had no cause of action to sue the Southern Railway under section 80 of the Railways Act. Overruling this plea, the trial Court gave a decree for Rs. 600, which was the sum it assessed as damages occasioned by late delivery of the goods. On appeal, the District Judge of North Arcot held that the plaintiff could not recover damages from the defendants, unless he proved that the deterioration occurred on the Southern Railway. For this conclusion, he relied on the provisions of section 80 of the Railways Act and construed the suit as one against the Southern Railway, though it was laid against the Union Government. He reversed the decree of the trial Judge and dismissed the suit.

The petitioner in the revision petition sued the Southern Railway and the Western Railway owned by the Union of India for recovery of Rs. 1,053-10-6 for loss of a bale of piece-goods despatched by rail from Sidhpur to Madras on 12th December, 1952. Sidhpur is located on the Western Railway, and the goods had to travel over the route of Southern Railway before reaching the destination at Madras. The Western Railway, which is the second defendant, resisted the suit on the plea that there was no notice to them under section 77 of the Railways Act. The Southern Railway, the first defendant, denied liability on the ground that the goods never reached their limits.

The learned Chief Judge of the Court of Small Causes, Madras, found that the goods never entered the route of the Southern Railway, having been lost by theft committed by railway servants while they were on transit over the route of the Western Railway. But, on the finding that notice under section 77 of the Railways Act was given only to the Southern Railway, he purported to follow the decision in *The Governor-General-in-Council* v. *Ajit Bhai Jayantilal*[1], and held that the plaintiff's claim was communicated by the first defendant, the Southern Railway, to the second defendant, the Western Railway, within the six months' period, and, therefore, the notice given was sufficient as against the second defendant, the Western Railway, also. He gave a decree for the sum claimed against the second defendant, the Western Railway but dismissed the suit as against the first defendant, the Southern Railway. The two other Judges of the Small Cause Court who heard the New Trial Application held that a separate notice under section 77 of the Railways Act was necessary to the second defendant; and, since such notice was not given, they dismissed the suit against both the defendants. Against that dismissal, the plaintiff has preferred the revision petition.

The common question arising in all these cases is, what is the scope and effect of sections 77 and 80 of the Railways Act? Section 77 reads thus:

> "*Notification of claims to refunds of overcharges and to compensation for losses.*—A person shall not be entitled to a refund of an overcharge in respect of animals or goods carried by railway or to compensation for the loss, destruction of deterioration of animals or goods delivered to be so carried, unless his claim to the refund or compensation has been preferred in writing by him or on his behalf to the railway administration within six months from the date of the delivery of the animals or goods for carriage by railway."

Section 80 of the Railways Act, which figured largely in the arguments before us, may be thus reproduced shorn of its irrelevant parts:

> "Notwithstanding anything in any agreement purporting to limit the liability of a railway administration, a suit for compensation for loss, destruction or deterioration of goods may be brought either against the railway administration, to which the goods were delivered by the consignor thereof, or against the railway administration, on whose railway the loss, destruction or deterioration occurred."

We may now notice the definition of 'railway administration' contained in section 3 (6) of the Railways Act of 1890. It runs thus:

> "'railway administration' or 'administration' in the case of a railway administered by the Government means the manager of the railway and includes the Government, and, in the case of a railway administered by a railway company, means the railway company."

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1. (1952) 2 M.L.J. 24.

The definition of a railway company occurring in section 3 (5) of the Act, runs as follows :

" ' Railway company ' includes any persons, whether incorporated or not, who are owners or lessees of a railway or parties to an agreement for working a railway."

Before we consider the arguments addressed to us, it may be necessary to give a brief account of the history of the different railway systems in India and how most of the systems came to be ultimately owned and managed by the Government. In all the cases before us, the various railways over which the goods were carried were all owned and managed entirely by the Central Government both at the time when the goods were carried and also at the time when the suits were instituted.

Upto 1925, most of our railways were managed by companies, though all the principal railway systems were the property of the Central Government. The management of all the major railway systems were taken over by the Central Government one by one from these companies during the period between 1st January, 1925 and 1st October, 1944. By 1944, except a few railways owned by the then existing Indian States and a few small railway systems owned by District Boards or by companies, the rest of the railways in India were directly run by the Central Government. The railways owned by the Indian States were taken over by the Central Government in 1949 and 1950, and they were merged with the adjoining Government-owned railway systems. Thus, by 1st April, 1950, the entire railways of the country were owned by the Government excepting the few small railways owned by District Boards or by companies. After the Government thus became not only the owner but also the agency working these railways by 1st April, 1950, a reorganisation of the railway systems owned and run by the Government was undertaken in the beginning of 1951. For this purpose, all the Government railways were regrouped and six railways were evolved,—respectively called the Southern Railway, the Central Railway, the Western Railway, the Eastern Railway, the Northern Railway, and the North-Eastern Railway. The regrouping of these railways commenced on 14th April, 1951 and ended on 14th April, 1952. Thereafter, the railway systems in India fell under one or other of the following categories: (1) railways owned and managed by Government, (2) railways owned by companies or District Boards, but worked by the Government, and (3) railways owned by companies or District Boards and worked by the owning companies or District Boards themselves.

As regards the railways concerned in the suits now before us, they were all owned by the Government even before 1925 ; but all of them came to be taken over from the companies, which were previously running them, one by one at various points of time between 1925 and 1944, so that, the result is that, at the time when the goods in these cases were consigned to one or other of these railways, all the railway systems, over which the goods had to be carried, not only belonged to the Government, but were also run by the Government. For the purpose of these cases, the reorganisation, and regrouping of the Government railways undertaken in April, 1951, has therefore no significance except in relation to the arguments addressed to us on the question of the General Manager of the particular railway to whom notices under section 77 of the Railways Act and section 80 of the Civil Procedure Code had to be given.

The main contention of the learned counsel, Mr. K. Rajah Ayyar, for the Union of India representing the various railways was that section 77 of the Railways Act should be interpreted in conjunction with section 80 of that Act and, for this purpose, each railway system comprised in the six big units of the Government railways mentioned above should be taken to be a separate unit and a separate legal entity both for the purpose of giving notice under section 77 and for the purpose of liability for the claim for compensation which arises under section 80. He referred us to the various sections of the Railways Act to show that, under the scheme of this Act, the various railway units worked by the Government, though owned by a single person in the eye of the law, were still treated as separate railway administrations. He also drew our attention to the definition of "railway administration" in section 3 (6) of the Act, and contended that, for the purposes of the Railways Act, a distinction was made between

the Central Government which owned the railways, and the railway administrations as such. In the Railways Act of 1879, the words "includes the Government", now found in section 3 (6) of the Railways Act of 1890 were not found in the corresponding definition of the "railway administration". In our opinion, this has not any significance, because, in 1879, none of the major railways were owned by the Government; nor was any railway run by the Government. It was only by 1890 when the present Railways Act came to be passed that the Government came to own some of the railways, though all the railways owned by the Government were managed by companies, which previously were the owners of these railways. In order to support his argument that, though the Government owned a major part of the railway systems in this country, still, for the purpose of administration, of the Railways Act, the Government maintained a distinction between themselves and the railway administrations as such, learned counsel referred to section 4 of the Act and numerous other sections, wherein, according to him, even in cases where the power vested in the Government under the Act has to be exercised in respect of a railway administration managed by the Government, it was the President who should be deemed to be the Government exercising its executive function and he is to issue directions to the managers of the railways through the railway inspectors appointed under the Act. As illustrating this point Mr. Rajah Ayyar said that the 'Central Government' mentioned in the Railways Act was the President of the Union of India by reason of section 3 (8) of the General Clauses Act and the power of the President in relation to the railways is exercised through the Communications Department of the Government of India, which controls the work of the railway inspectors. But the running of the railways is the responsibility of the Railway Minister who is in charge of a separate department of the Government of India. He also referred to the fact that, in section 77, notice is directed to be given of the claim for compensation, not to the Central Government in the case of a railway owned by the Government, but only to the railway administration.

This distinction appears to us to be without any basis, because, the scheme of the Railways Act was intended to cover not only railways owned and managed by the Government, but also other railways like company railways and District Board railways. Powers taken by the Government under the Act of 1879 to direct and regulate running of railways by companies and other bodies had necessarily to be retained in the Railways Act of 1890, because, even then, many of the railways continued to be owned and managed by companies and District Boards. One illustration would be sufficient to show the hollowness of this argument. Penalties provided under Chapter IX of the Railways Act would obviously have no place in the case of railways administered by the Government. It cannot be maintained that the President has the power to fine either the Railway Minister or the Manager of a Government owned railway for any of the transgressions for which penalties are provided under Chapter IX.

In this connection, we may also notice another argument of Mr. Rajah Ayyar. He stresses the fact that section 80 of the Railways Act was retained in the statute, despite most of the railways having becomes Government-managed by 1948. He also pointed to the amendment of section 80 of the Civil Procedure Code in 1948 by Act VI of 1948. The purport of this amendment was to introduce a new clause in that section relating to notice to Government for suits concerning railways owned and run by the Government. In the section as it stood before amendment, in the case of a suit against the Central Government, a notice to the Secretary of that Government was sufficient. But, after the amendment, clause (*b*) of section 80 provided that, in the case of a suit against the Central Government, where the suit relates to a railway, notice was necessary to the General Manager of that railway. The contention pressed upon us was that, if the different railway systems managed by the Government were not distinct legal entities, notice to the General Manager of the different railway systems would not have been insisted upon by the amending Act.

In our opinion, neither considerations of the person to whom notice is directed to be given in the case of a suit against the Central Government in relation to its

management of railways, nor the provisions of section 80 of the Railways Act could govern the scope and application of section 77 of the Railways Act. It is well-known that statutory notices to Government found in various enactments are only matters of procedure and are not matters of substantive rights. True, failure to give such a notice might result in the suit being dismissed ; but that does not alter the situation. In its essence, notice of a claim or of a suit to the Government is only a provision, the purpose of which is to prevent vexatious suits against Government, and also to facilitate composition of just claims made by parties against the Government, resulting in avoidance of unnecessary litigation against Government. Such a provision in any Act cannot be construed as limiting or governing the substantive rights of parties like the citizens of the country who deal with railways managed by the Government. The liability of the Government arising by reason of its owning and managing the railway systems of the country is a liability arising under statute law relating to contracts. True, this liability is in some instance limited and regulated by the Railways Act ; but, that is entirely different from saying that the liability owes its origin to the Railways Act. Section 79, Civil Procedure Code, contains the provision regulating suits against Government. It provides that, in a suit by or against the Government, the authority to be named as plaintiff or defendant shall be, in the case of a suit by or against the Central Government, the Union of India. It will be seen that this provision makes no distinction between the various activities of the Union Government, some of which are commercial and the rest are Governmental in the strict sense of that term. The Central Government may incur liability, for which a suit may be laid against it either in its commercial activity or in its other activities. The form of the suit laid against the Central Government in either case is the same. To contend that, in its railway activity the Central Government has created separate legal entities like the different railway systems called the Southern Railway, the Western Railway, etc., one finds no authority either in the Civil Procedure Code or in the Railways Act. In Chapter VII of the Railways Act, which deals with the responsibilities of railway administrations as carriers, the term used, wherever the measure of liability has to be fixed, is "railway administration". The same term is found used in sections 77 and 80 of the Railways Act also. The definition of this term in the Railways Act includes, in the case of a railway administered by the Government, the Government itself. But in the case of a railway administered by a railway company, this term means the railway company. Of course, this definition also provides that, in the case of a railway administered by the Government, the term "railway administration" shall mean the Manager of the Railway. But, from this alone, one cannot conclude that railway administrations as such have a separate legal existence in the eye of the law as persons having juristic personality capable of being sued for a liability incurred by the Central Government. In many places in the Indian Railways Act, responsibilities and duties are cast upon the Manager of the railways, and certain functions are also allotted to such managers. In the case of railways managed by the Government, such duties and responsibilities have to be undertaken only by the manager of the railway as an authority nominated under the Railways Act. In such cases, it was necessary to make a distinction between the owner of the railways, namely the Central Government, and the authority actually running the railway, upon whom duties have been cast by the Railways Act. Thus, the definition of 'railway administration' with reference to a Government railway had to make provision for indicating not only the Government, but also the Manager of the railways. That is the real explanation for this definition in relation to Government railways. From this, it cannot be inferred that either the Managers of the different Government railway systems or the different zonal units of the Government railway systems were intended to be separate legal entities capable of being sued, apart from the Central Government. If regard is had to the language of section 79, Civil Procedure Code, it would be obvious that a suit could be laid against the Central Government without impleading the Manager of a railway belonging to the Central Government either as a separate defendant or as the officer who should represent the Government in that suit. In many of the decisions cited before us, suits were laid against the Union of India representing a particular railway owned by it. This feature has been em-

phasised in some of the decisions, as though it meant that the principal defendant was the railway system and the Government of India represented that system. In our opinion the reverse ought to be the correct position. Section 80, Civil Procedure Code was amended in 1948 when different railway companies were running the railways owned by the Government, and, in the eye of the law, they were the persons responsible to the public who dealt with them. Amalgamation was effected only in 1951, and this is one additional reason why the amendment of section 80, Civil Procedure Code, could not have any effect upon the question as to who is liable to answer a claim arising after 1948 with reference to a railway system owned and run by the Central Government.

The provisions of section 80 of the Railways Act were sought to be interpreted by Mr. Rajah Ayyar on the basis that the Central Government in relation to one railway system run by it is different from the same Government in relation to another railway system run by it. Just as we have pointed out that the question of notice under section 80, Civil Procedure Code, has no bearing on the liability of the Central Government in relation to the railways run by it, similarly, the provision in section 80 of the Railways Act has no relation to the frame of the suit, which has got to be filed against the party liable to a citizen dealing with the railways in the country. Section 80 of the Railways Act was intended to provide for the liability of different railway systems in connection with what is called " through traffic ". In 1890, when this section was enacted, different railways in the country were owned by different railway companies and administered by them. Traffic passing through the railway of one or more of such different railway companies gave rise to claims for compensation. The contracting railway, wherein the traffic originated, was in the habit of inserting clauses in the agreement called Risk Notes limiting its liability when loss or destruction of the goods took place in another railway, through which through-traffic had to pass. Difference in judicial opinion arose as to the liability of the respective railways, over which the traffic passed, and the necessity for giving notice to all these railways under section 77 of the Act. Differences of opinion also arose as to whether the contracting railway was the principal and the delivery-railway, its agent. In some cases, the opinion was also expressed that there was something like a partnership between the railways constituting the route through which the goods had to pass. In order to set at rest this conflict, the Legislature enacted section 80 of the Railways Act. The purpose of the enactment was to simplify the law as to liability and to indicate clearly the persons who could be sued for that liability. It provides that the owner of the goods lost or destroyed in the case of through-traffic could sue either the contracting railway or the railway over which the loss or destruction of the goods had occurred. This provision was an overriding provision, because, the section says that this would be the remedy open to the person dealing with railways notwithstanding any clause in the contract which was entered into with the originating railway. That this provision was retained even after 1948 when all the major railway systems of the country came to be owned and run by the Government is the main plank in the argument of Mr. Rajah Ayyar. According to him, it follows from this that though the six zonal railways of the Government may not be separate juristic entities in the eye of the law, they were treated for the purpose of the Railways Acts and claims of the public dealing with those railways, as separate entities. In our opinion, this inference does not follow, because even after 1948 a few railway systems are still working in this country which are not owned by the Government and are also not run by the Government. These are District Board and company railways. Though they may be very few in number, their existence accounts for the continued retention of section 80 in the Railways Act, because even now, it is quite necessary to provide for liability in the case of through-traffic where such traffic is carried not only over Government-run railways, but also over what we would call private railways. Section 80 which was intended to deal with liability of the railway systems for through-traffic, could yield a workable result only if different railway systems are treated as units according to ownership. It may be open to the Government to convert their different zonal systems into corporations or juristic entities, when alone the argument of Mr. Rajah Ayyar would have any

point. The provisions of the Railways Act do not contain any indication that this was attempted or effectuated, though for the purposes of supervision and control of the opening and running of the railways in the interests of the public, the Act treated each railway system including Government railways as a separate unit. We are here concerned only with legal liability which can be determined only with reference to juristic entity, and, in the case of all railways owned by the Government, they fall under one ownership, and, for the purpose of legal liability, they must be treated as one person.

Section 80 of the Railways Act cannot be tacked on to section 77 of that Act which contains a rule as to notice. In other words, to interpret section 80 of the Railways Act, section 77 of the same Act has no relevance. A rule as to notice is a technical rule relating to procedural matters. But a question of liability is neither a technical matter, nor a procedural one. It deals with substantive rights of parties.

Learned counsel for the railways put forward the extreme contention that the intimation required by section 77 of the Railways Act should be given to every railway administration, that is to say, to every zonal unit of the Government railways, over which through-traffic passed in a particular case. We do not find any warrant for this extreme contention in the language of the enactment. It merely says that a person shall not be entitled to compensation in respect of loss or destruction of goods carried by railway unless his claim to the refund or compensation has been preferred in writing to the *railway administration* within six months from the date of delivery of the goods for carriage by railways. At first sight, this can only mean that notice of the claim should be given to the railway administration, to which the goods were delivered. In the case of through-traffic, which has to be carried over more than one zonal unit of the Government railways, the term 'railway administration' in section 77 can either mean the Central Government or the Manager of the railways. Section 140 of the Railways Act describes the mode in which such notices should be served on railway administrations. Clause (*a*) of that section provides that such notice should be delivered to the Manager or Agent of the railway. In the case of Government railways comprised in different zonal units, any Manager of one such unit will answer the description. We do not find any warrant for the contention that notice should be given to everyone of the Managers of the different zonal railways owned by the Government before section 77 could be said to be complied with. Only one notice is contemplated under section 77, and it does not say that such notice should be given to the General Manager of more than one railway. In all the cases now before us, notice under section 77 has been served within the time fixed, namely, six months, upon the General Manager of the delivering railway. This has been held by the lower Courts to be ineffectual and not in accordance with section 77. The purpose of a notice under section 77 is not anything more than giving information of the claim to the concerned authorities to enable them to investigate and satisfy the claim. By no stretch of reasoning could such notice form part of the cause of action, upon which the right of the plaintiff to claim compensation rests though it might be relevant on the question of the forum in which the suit could be brought. The result of non-compliance with section 77 may lead to the dismissal of the suit; but, that would not be on the ground that the plaintiff had no cause of action in law for his claim. Viewed in this light, one notice to a General Manager of one Government railway concerned in the route over which through-traffic passed in the cases before us should, in our opinion, be sufficient because all the railways, over which the traffic passed, are owned by the Central Government. If the Central Government desires that such notice should be given either to its contracting railway unit or to its delivery railway unit, section 77 should be suitably amended, in order that no confusion may arise and lawful claims may not be defeated on technical pleas. In the absence of any specific enactment either in section 77 or in section 140 indicating the particular General Manager, to whom notice ought to be given in a case of through-traffic carried over more than one zonal unit of the Government railways, we are un-

able to hold that notice to any one such General Manager is insufficient compliance with these provisions.

The case-law on the subject discloses divergent views taken by different High Courts. Even in this Court, no uniform view has held the field as regards the notice required to be given under section 77 and the import of section 80 of the Railways Act. Cases which were decided before 1948 touching the question of the import of section 80 of the Railways Act do not, in our opinion, afford any safe guidance for the decision of the cases now before us which have arisen subsequent to the independence of this country. Indeed, this difference was specifically noticed in *Dominion of India* v. *Firm of Museram Kishun Prasad*[1]. The Bench in that case observed :—

> " Further, merely suing the Governor-General as representing the entire State-owned railways (at least before the Indian Independence Act was passed, which is the case here), is not a proper form of suit, because, that would render section 80 of the Indian Railways Act otiose and meaningless."

That case laid down that, before the Indian Independence Act, section 80 of the Railways Act treated each railway administration in the case of through-traffic as a separate entity. There have been, however, decisions of other High Courts after 1948, which have recognised the difference which we have endeavoured to point out. Before we refer to these decisions, we would refer to *Governor-General* v. *Sukhdeo Ram*[2], in which almost all the case-law on the subject has been reviewed. There, the plaintiff consigned 600 tins of cocoanut oil to a station on the South Indian Railway for delivery at Monghyr railway station on the East Indian Railway. The consignment had to traverse three railway systems, namely, the South Indian Railway, Bengal Nagpur Railway and the East Indian Railway. On reaching Monghyr, the consignment was found short by 25 tins. The plaintiff claimed damages for this short delivery. The East Indian Railway which was made a defendant to the suit resisted it on the ground that the loss had not occurred over its route. The trial Court held that the Governor-General was liable in view of the fact that all the three railway systems were State-managed and it did not matter where the loss took place. Both the trial Court and the first appellate Court, got over the provisions of section 80 of the Railways Act either on the ground that the delivery railway was the agent of the contracting railway or on the ground that the definition of ' railway administration ' in section 3 of the Railways Act included the Government. The Bench of the Patna High Court disapproved of this reasoning of both the lower Courts on the ground that the specific purpose of the enactment of section 80 in 1890 was to set at rest the wide divergence of judicial opinion on the question of the exact relationship between the consignor and the receiving railway and the other railway systems over which the goods had to be carried in order to reach the destination. The Bench held that section 80 laid down a specific rule of law governing the liabilities of the different railway administrations as regards compensation for loss, and, therefore, it being a specific provision, must be given effect to, irrespective of any other considerations based on the doctrine of agency or of partnership which may lead to conflicting results. In our opinion, this approach lost sight of the fundamental difference between the conditions which existed before 1948 and the conditions which came into existence after 1948. Section 80 was a creation of the statute to lay down a rule of law governing liability, irrespective of the contract between the parties. At the time when the rule was laid down, the Government as such was not liable for the loss of goods on through-traffic ; but the different railway systems or companies were so liable. To say that that rule must apply even where through-traffic is carried exclusively over Government railways and the liability for loss on such traffic is that of one individual,—the Government—seems to us to ignore a material difference.

The view which we have taken gains some support from *Dominion of India* v. *Jagadiah Prasad*[3]. There, a Bench of the Calcutta High Court had to deal with a

1. A.I.R. 1950 Nag. 85.
2. A.I.R. 1949 Pat. 329.
3. A.I.R. 1949 Cal. 622.

case of compensation for loss in transit of goods consigned at Alleppey on the South Indian Railway for deliverey at Gaya on the East Indian Railway. The suit was laid against the Governor-General-in-Council as representing the Bengal Nagpur Railway and the East Indian Railway. When the goods were delivered at Gaya on the East Indian Railway, a shortage of 9 maunds was found. The suit was filed in the Presidency Small Cause Court, Calcutta. The maintainability of the suit in that Court was questioned by the Governor-General on the ground that neither the Bengal Nagpur Railway nor the East Indian Railway carried on business within the local limits of the Courts and no part of the cause of action arose within those limits. There was a provision in section 18 of the Presidency Small Cause Courts Act, which gave jurisdiction to the Calcutta Small Cause Court to try a suit where the cause of action had arisen either wholly or in part within the local limits of the jurisdiction of that Court, and leave of the Court had been obtained before the institution of the suit. The Small Cause Court Judge held that loss occurred over the Bengal Nagpur Railway and granted a decree against the Governor-General-in-Council as representing the Bengal Nagpur Railway. An application was then made to a Full Bench of the Small Cause Court, which held that the Court had jurisdiction to entertain the suit by reason of the provision in section 18 of the Presidency Small Cause Courts Act mentioned above. The suit had been treated in the Small Cause Court as laid against two defendants, namely, the two different railway systems and not against the only defendant to the suit, the Governor-General. In discussing this question, the learned Chief Justice observes thus :—

" It is to be observed that the learned advocate for the petitioner concedes that the propoer way of viewing the suit is as a suit against the Governor-General-in-Council and not as a suit against the Governor-in-Council representing two railways. The Governor-General-in-Council, and now, the Dominion of India, does own these two railways ; but, as owner of the railways, the Governor-General in-Council, or the Dominion of India is the same entity. It does not own the East Indian Railway in one capacity and the Bengal Nagpur Railway in another capacity . It owns both and therefore it may well be that, upon the true view of the facts in this case, this was a suit against one defendant, and one defendant only, namely, the Governor-General-in-Council, and now, the Dominion of India. As I have said, regarded in that way, this case clearly falls within section 18-A of the Presidency Small Cause Courts Act and the Court had jurisdiction."

The learned Chief Justice went on to discuss the question at issue regarding the suit as against two entities. Though he upheld the finding of the Small Cause Court that it had jurisdiction both in the view that the suit was laid against one defendant, namely, the Governor-General-in-Council, and in the view that the suit was laid against two entities, he expressed his preference for the former view in the following terms :—

" It was urged, however, that eventually it was held that the Bengal Nagpur Railway was solely responsible and the suit as against the East Indian Railway was dismissed. If the suit could be regarded as suit against two entities, that would be so. But, if it should be regarded, as I think it might well be regarded as a suit against one entity, there was no dismissal of the suit in part at all."

In referring to the decision of a single Judge of that Court which took a contrary view, the following observations of the learned Chief Justice further reveal his opinion :—

" This case before Lord, J., of course, proceeds on the assumption that these three railways which are now owned by the Dominion of India were three separate entities. But it may be said that they are now merely three pieces of property owned by one owner, the Dominion of India. The Dominion in that case might have been sued, and if requisite notices were served at the Head Offices of either the East Indian Railway or Bengal Assam Railway, it might be said that the case fell within section 18-A of the Presidency Small Cause Courts Act, and no question of jurisdiction would have arisen."

Of course, we realise that the learned Chief Justice did not decide the case on this point ; but he was prepared to hold that the Small Cause Court had jurisdiction, treating the suit laid as one against the Dominion of India alone.

A Full Bench of the Assam High Court in *Chandra Mohan* v. *Union of India*[1], had to deal with the question whether a suit could be brought against the Central Govern-

1. A.I.R. 1953 Assam 193.

ment for loss occasioned to goods which were to have been carried over railways owned by that Government. The Full Bench held that a suit under section 80 of the Railways Act in such a case could be brought against the Government of the State concerned and that the railway administration as such need not be impleaded as a party to that suit. The Full Bench laid stress on the difference pointed out by us, namely, that section 80 was intended for ascertaining the liability of various railways where they are owned by different bodies and not by the same owner. The Full Bench made further observations as to what the plaint must allege on the face of it to show the cause of action, that is to say, as to how and in what capacity the State is sought to be made liable,—whether as owner of the railway to which the goods were consigned or as owner of the railway on which the loss occurred or both. That question has no significance in the case now before us, because the plaints in all the cases set out all the necessary facts constituting the cause of action. This Full Bench decision has been followed in *Natwarlal* v. *Union of India*[1]. It is unnecessary to refer in detail, to this decision, because, there is not much discussion of the question in it.

In this Court, Mack, J., in *Kishanlal Roopchand* v. *Dominion of India*[2], mainly relied on *Governor-General* v. *Sukhdeo Ram*[3], for holding that section 80 treated every railway system, even though owned by the same Government, as a separate entity for the purpose of liability for loss of goods concerned in throughtraffic. In the view we have taken, we must express our respectful disagreement with Mack, J. Basheer Ahmed Sayeed, J., in *Governor-General* v. *Ajit Bhai Jayantilal*[4], took the view that notice under section 77 of the Railways Act given to the delivery railway would be sufficient compliance if it was proved that before the expiry of the period of six months such notice was communicated to the contracting railway. It is not necessary for us to rest our conclusion upon this circumstance of communication of the notice to the contracting railway, because we have, held that section 77 does not contemplate more than one notice and it does not specifically lay down that such notice should be given to any particular railway administration. Other decisions of the Patna, Orissa and the Punjab High Courts have been cited before us by Mr. Rajah Ayyar. We are relieved of the duty of examining these decisions, because, they do not set forth any new ground apart from the grounds noticed by us already. It appears, to us, desirable that the Central Government should undertake legislation dispensing with notice under section 80, Civil Procedure Code, in a case where the notice required under section 77 has been given. It would also be better if legislation is undertaken to clarify which is the railway administration to which notice should be sent under section 77 in a case where through traffic passes through more than one railway system owned by the Government. We assume for this purpose that not more than one notice would be necessary in any event under section 77 of the Railways Act. Section 140, which only deals with the manner of service of notices on railway administrations, does not, however, need any clarification by amendment. In the view we have taken on the question of the frame of the suit in these cases and the liability of the Government as owner of the railways over which the traffic in these cases passed, the notice given both under section 77, Indian Railways Act and section 80, Civil Procedure Code, to the General Manager of one or other of the railway administrations concerned must be held to be sufficient notice.

The Second Appeals are therefore allowed, and in both cases, the decrees of the trial Courts are restored with costs.

C.R.P. No. 433 of 1956 is also allowed, and the decree of the Chief Juge, Court of Small Causes, is restored with costs.

R.M. ——— *Appeals and revision allowed.*

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1. A.I.R. 1957 M.P. 157.
2. (1955) 1 M.L.J. 79.
3. A.I.R. 1949 Pat. 329.
4. (1952) 2 M.L.J. 24.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA AYYAR.

Lakshmana Purayar .. *Petitioner**

v.

V. S. Thiagaraja Mudaliar by his power of attorney agent G. A. Nair .. *Respondent.*

Madras Cultivating Tenants (Payment of Fair Rent) Act (XXIV of 1956), *section* 4 (3)—'Pathukattu *tenure* '—*If connotes a permanent right of occupancy—Fair rent—If could be fixed.*

Words and Phrases—' Pathukattu *tenure* '—*Meaning of.*

The word *Pathukattu* (Tamil) means a ryot's usual holding and does not imply necessarily a permanent tenancy. The mere use of the word '*Pathukattu*' in a tenancy does not mean that there is a permanent tenancy right in the land.

The limitation laid down in section 4 (3) of the Madras Cultivating Tenants (Payment of Fair Rent) Act would not apply to cases where the period fixed under the contractual tenancy has expired and a landlord is entitled to apply to the Rent Court to fix the fair rent in respect of the tenancy continuing after the contract period. In fixing the fair rent the Rent Court would be entitled, and indeed bound, to take into consideration not only the income from the lands but also the trees standing thereon as part of the demised land.

Petitions under section 11 of Madras Act XXIV of 1956 read with section 115 of Act V of 1908, praying the High Court to revise the Orders of the Court of the District Munsif and Rent Tribunal, Thiruthuraipoondi, dated 4th November, 1958 and made in F.R.A. Nos. 5 and 4 of 1958 (F.R.P. Nos. 358 and 357 of 1957, Rent Court, Tiruvarur) respectively.

V. Venkataraman, for Petitioner.

K. S. Naidu, for Respondent.

The Court delivered the following

JUDGMENT.—These Revision Petitions have been filed by the respondents tenants against the order of the Rent Tribunal (District Munsif), Tiruturaipundi, in F.R.A. Nos. 4 and 5 of 1958, confirming the fair rent fixed in respect of the lands held by them. The applications for fair rent were filed by the landlord before the Rent Court, Tiruvarur. They were resisted by the tenants substantially on three grounds ; (1) that the lands were originally waste lands which were reclaimed and brought under cultivation by the terms on a tenure known as "*Pathukattu* tenure" and that the respondents-tenants either as incidental to such tenure or otherwise were entitled to pay only the contract rent; (2) that fair rent could not be fixed in respect of a portion of the desmised property as it consisted of only coconut trees, but it could only be fixed in regard to that portion of the land which was utilised for cultivation of paddy crops, and (3) that the landlord was not entitled to a rent of more than three kalams of paddy per *mah.* Both the Rent Court and the Appellate Authority rejected the case of the tenants that they were entitled to permanent right of occupancy and also their further case that no fair rent could be fixed in regard to trees on the land. The Conciliation Officer rejected the contention of the tenants that the landlord was entitled only to the maximum rent of three kalams per *mah* and fixed cash rent on the basis of percentage of the normal gross produce of the land at the market rate. That order was confirmed by the Appellate Authority.

In revision Mr. V. Venkataraman, on behalf of the tenants, raised substantially two questions before me. He did not contest the finding of fact of the Appellate Authority that the tenants had failed to prove a right of permanent occupancy. But he contended that it being admitted that the tenants were holding under *pathukattu* lease it should be found that they were entitled to permanent right of occupancy. According to him, the term "*pathukattu*" itself implied permanent customary right of occupancy. There was, however, no evidence before the lower Courts to show that the term "*pathukattu*" has the meaning attributed to it by the petitioner. In the Tamil Lexicon the word "*Pathukattu*" is translated as "a ryot's usual holding". That does not imply that *pathukattu* is necessarily a permanent tenancy. It is not disputed that it is for the tenant to prove that he is disentitled to permanent right of occupancy. In *Naina Pillai Marakkayar* v. *Ramanathan Chettiar*[1], the Privy Council

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* C.R.P. Nos. 2120 of 1958 and 17 of 1959. 1st July, 1959. (10th Asadha, 1881-Saka).

1. (1923) 46 M.L.J. 546 : L.R. 51 I.A. 83 : I.L.R. 47 Mad. 337 (P.C.).

has observed that no tenant of lands in India can obtain any right to a permanent tenancy by prescription in them against his landlord from whom he holds the lands.

It has also held that such right can only be obtained by a tenant by custom or by a grant from an owner of the land who happens to have power to grant such a right, or under an Act of Legislature. The lands in the instant case are ryotwari lands of which the respondents are pattadars. I have already pointed out that the finding of the lower Courts is that no custom was proved by which the tenants could be said to have obtained rights of permanent occupancy. The mere use of the word "*Pathukattu*" tenancy in the petition cannot mean that there is a permanent tenancy in the land.

It is next contended by Mr. Venkataraman that the Rent Court has no jurisdiction to fix a fair rent higher than the contract rent. Reference was made in this connection to the provisions of section 4 (3) of the Madras Cultivating Tenants Payment of Fair Rent Act, 1956 (Madras Act XXIV of 1956). Section 4 (3) states :—

> "Where the contract of tenancy provides for payment of a rent lower than the fair rent payt able under the above provisions, the contract rent alone shall be payable during the contrac- period."

The contention raised on behalf of the petitioners is that the lands were reclaimed by the tenants, that the trees thereon were planted by them, that they have been paying a small rent in respect of the holding, and that such rent being less than the fair rent fixed by the Rent Tribunal, it is the former that could be legally collected by the landlord as rent under the provisions of section 4 (3). I have already held that the tenants have not established any permanent tenancy right, nor have they established by evidence that they are holding for any fixed period on a fixed rent. Therefore, the rent that was paid in the previous years could only be in respect of an yearly tenancy. There is nothing in section 4 (3) of the Act which makes such rent enure for the time beyond the period of tenancy. In the circumstances of the case the tenancy should be held to be yearly tenancy. The rent paid by the respondents-tenants for the previous years could only be rent for those years. The fair rent fixed by the Rent Tribunal was only in respect of a period beyond the contract period, namely, that of the yearly tenancy. Therefore, there is nothing in section 4 (3) to disentitle the landlord from applying for fair rent.

It is next contended on behalf of the petitioners that the rent Court has no jurisdiction to fix fair rent in respect of the coconut trees standing on the land. The argument is put before me in two ways. Firstly it is contended that the fair rent could be fixed only in regard to paddy land and not in regard to coconut trees standing thereon. Secondly it is stated that so far as the coconut trees are concerned there would be an exemption within the purview of section 15 of the Act. It is contended that the trees having been planted by the tenants, the stipulation for the rent in regard to them could only be a contract for the collection of produce of any kind within the meaning of section 15 and that therefore, it would be exempt from the operation of the Act. I cannot, however, accept the contention. The coconut trees are situate in a part of the demised land. It would not be open to the rent Court to split up the lease and then proceed to fix fair rent in regard to the paddy lands alone. The land was admittedly let out for agricultural purpose. In fixing fair rent, the rent Court would be entitled and indeed bound to take into consideration the income received by the tenants from the trees. This is what has been done. I cannot agree with the contention of the learned advocate for the petitioner that in regard to the trees it was mere contract for collection of produce of the trees leased. I am, therefore, of opinion that the Rent Court was right in having proceeded to assess fair rent on the basis of not merely gross income from the paddy fields but also on the basis of the income obtained from the trees standing on the agricultural land and being part of the demised land.

The Civil Revision Petitions fail and they are dismissed. There will be no order as to costs.

R.M. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

The Proprietor, Swarnambiga Motor Service, Palanganathan Post, Madurai .. *Appellant**

v.

M. Muthuswami .. *Respondent.*

Workmen's Compensation Act (VIII of 1923), *section* 30—*Estimation of loss of earning capacity of injured workman by a referee as agreed by the parties—Order of the Commissioner directing compensation on the basis of—Not appealable.*

Where the employer and the employee agreed before the Commissioner that the percentage of loss of earning capacity, if any, sustained by the employee will be estimated by a Medical Board constituted by the Director of Medical Service, Madras, and that the estimate of the Board will be accepted as final and binding on them and the Medical Board assessed the loss of earning capacity, the order of the Commissioner directing compensation to be paid on that basis would not be open to appeal under section 30 of the Workmen's Compensation Act on the ground that the Medical Board has given no sufficient data for its conclusion.

The jurisdiction to decide the loss of earning capacity of an injured workman is with the Commissioner. If at the invitation of the parties the Commissioner goes outside his jurisdiction and refers what should have been properly his decision to the decision of the Medical Board it should be held that he acted *extra cursum curiae* and that the parties would be bound by the opinion of the referee and that no one of them would have a right to complain if it goes against him. It is settled that in such a case there would be no right to appeal.

Burgess v. *Morton,* L.R. (1896) A.C. 136, referred.

Appeal against the Order of the Additional Commissioner for Workmen's Compensation, Madras, dated 27th December, 1957 and made in W.C. Case No. 540 of 1956.

R. Kannan, for *M. R. Narayanaswami* and *K. N. Balasubramanian,* for Appellant.

S. Mohan Kumaramangalam and *K. V. Sankaran,* for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal at the instance of the employer against the Order of the Additional Commissioner for Workmen's Compensation, Madras, in W.C. No. 540 of 1956, granting a sum of Rs. 1,470 as compensation for the injuries sustained by the respondent while working for the appellant.

When the matter came up before the Commissioner, the employer and the workman agreed as follows :

" (1) The monthly wage of the applicant was Rs. 139. (2) The percentage of loss of earning capacity, if any, sustained by the applicant will be estimated by a Medical Board constituted by the Director of Medical Service, Madras, and the estimate of the Board will be accepted as final and binding on them and (3) The employer will pay compensation to the applicant on the basis mentioned in items 1 and 2 above ".

In accordance with that agreement the matter was referred to the Medical Board and the Medical Board assessed the loss of earning capacity sustained by the respondent in respect of a partial permanent disability at 30 per cent. On the basis of that assessment the Commissioner calculated the compensation payable at Rs. 1,470 and directed the employer to pay the sum to the respondent. The employer has thereupon filed this appeal.

The only contention of Mr. R. Kannan who appeared for the appellant before me was that the assessment of the Medical Board was incorrect and that the Medical Board has given no sufficient data for arriving at the conclusion that the loss of earning capacity of the respondent could be put at 30 per cent. I am of opinion, that that contention would not be available to the appellant. He and the respondent agreed to refer the matter of the ascertainment of the loss of earning capacity to the Medical Board and agreed to abide by the decision of the Board. In such a case

* A.A.O. No. 100 of 1958. 27th April, 1959.

they would be bound by their agreement and they could not challenge the correctness of the assessment. That being so it would not be open to the appellant to challenge the order of the Commissioner based as it was on the conclusion of the Medical Board, by way of appeal under section 30 of the Workmen's Compensation Act.

In *Burgess* v. *Morton*,[1] a question of fact was raised and referred to the Court at the instance of certain arbitrators. Under the law only questions of law could be so referred. The Judge, however, gave judgment on the question referred to him. The question arose whether an appeal from the judgment would lie. The House of Lords held that as only questions of law could be referred to the Court as a special case, proceedings which referred the question of fact could be considered to be *extra cursum curiae* and that the judgment of the Court, in such a case, would be in the nature of an arbitrator's award and an appeal could not lie from it. At page 138 Lord Halsbury, L.C., stated the law thus :

> " My Lords, it has been held in this House that where with the acquiescence of both parties a Judge departs from the ordinary course of procedure and, as in this case, decides upon a question of fact, it is incompetent for the parties afterwards to assume that they have then an alternative mode of proceeding and to treat the matter as if it had been heard in due course."

The jurisdiction to decide the loss of earning capacity of an injured workman is with the Commissioner. It has been held that medical evidence being only opinion evidence would not be decisive of the question and that the Commissioner had to independently give a finding as to the extent of the loss of earning capacity. If at the invitation of the parties the Commissioner goes outside his jurisdiction and refers what should have been properly his decision to the decision of the Medical Board or some other agency, it should be held that he acted *extra cursum curiae* and that the parties would be bound by the opinion of the referee and that no one of them would have a right to complain if it goes against him. It is settled that in such a case there would be no right to appeal. Apart from the objection to the assessment of the loss of earning capacity by the Medical Board, there is no other objection to the assessment of compensation by the Commissioner.

The appeal, therefore, fails and is dismissed with costs.

V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

The Management of Buckingham and Carnatic Co. .. *Petitioner**

v.

Sri Venkatiah and another .. *Respondents.*

Industrial Disputes Act (XIV of 1947) *and Employees State Insurance Act (XXXIV of* 1948), *section* 73 *—Automatic termination of service of the employee under the Standing Orders—Whether the section is applicable —Award directing reinstatement—Writ.*

It was provided in the Standing Orders of the Management that if an employee is absent for eight consecutive working days without leave it shall be deemed that he left the Company's services without notice thereby terminating his contract of service. If he was ill and proved that fact to the satisfaction of the Management he was entitled to have his absence converted into medical leave for such period as he was eligible. In the instant case the medical officer of the Management company was unable to confirm that the employee had been ill. The circumstances under which the alternative evidence of illness produced by the employee was accepted by the Employees' State Insurance Corporation was refused to be disclosed to the Company.

Held : Section 73 of the Employees' State Insurance Act would apply only where an employer does some positive act dismissing, discharging or otherwise punishing an employee. It would not apply to a case of automatic termination of the service of the employee under the Standing Orders. Where the Labour Court accepted the *bona fides* of the medical officer of the company on which the

1. L.R. (1896) A.C. 136.

* W.P. No. 716 of 1958.

19th March, 1959.
(24th Phalguna of Saka, 1880.)

Management took the view it did, there was no scope for interference by the Labour Court and directing reinstatement. The award directing reinstatement of the employee has to be quashed.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in I.D.No. 27 of 1958 and in I.A. No. 455 of 1958 on the file of the Labour Court, Madras, and quash the Award, dated 24th July, 1958 and published in *Fort St. George Gazette*, dated 13th August, 1958 and made therein.

K. Rajah Iyer for *Messrs. King and Partridge*, for Petitioner.

B. R. Dolia, for Respondents.

The Court made the following

ORDER.—Venkatiah, the first respondent, was an employee of the Buckingham and Carnatic Company, Ltd. He was granted six days leave with effect from 10th January, 1957. Allowing for the holidays that followed he should have joined duty on 19th January, 1957. But he did not do so. Nor did he apply for extension of leave as required by the Standing Orders of the Company. Standing Order 8 (ii) of the Company provides that any employee who absents himself for eight consecutive working days without leave shall be deemed to have left the Company's service without notice thereby terminating his contract of service. The Standing Order, however, provides that if the employee gives an explanation to the satisfaction of the Management his absence shall be converted into leave without pay or dearness allowance. If it is also proved to the satisfaction of the Management that the absence was due to sickness, then the employee is entitled to have his absence converted into medical leave for such period as the employee is eligible. On 11th March, 1957, Venkatiah wrote to the Company that after reaching his village he was laid up with fever and dysentery and that he was under the treatment of the Civil Assistant Surgeon of the Government Hospital, Kanigiri. He also stated that after returning from his village he reported to the Medical Officer of the Employees' State Insurance, Perambur, who referred him to the Medical Officer of the Company. He, therefore, prayed that he might be given leave in accordance with the medical certificate he enclosed. It is necessary here to mention that in the claim filed by the Labour Union before the Labour Court it was stated that Venkatiah " underwent treatment in the Government Hospital, Kanigiri ", from 15th January to 7th March, 1959. However, the medical certificate which Venkatiah produced does not say that he was in hospital. All that it says is that he was suffering from malaria and dysentery and that he was under the treatment of Dr. Narasimha Rao, Civil Assistant Surgeon, Kanigiri. On receipt of the application of Venkatiah the Company directed him to appear before its Senior Medical Officer. That Officer reported on 22nd March, 1957, in these terms :

" I have examined this worker and am unable to confirm that he was ill for a period of nearly two months."

In consequence the Company declined to accept the explanation of Venkatiah and refused to condone his absence without leave. On 2nd May, 1957, Venkatiah wrote to the Regional Director, Employees' State Insurance, Mylapore, asking him to " help me and reinstate me into my service of B. & C. Mills." This letter was forwarded to the Company on 17th May, 1957, with a request for comments. On 24th May, 1957, the Company wrote to the Regional Director in the course of which they said :

" He was examined by our Senior Medical Officer on 22nd March, 1957 and the latter was unable to confirm that he was ill for a period of nearly two months as obviously a person who was continuously ill for two months suffering from malaria and dysentery would have shown some signs of the after-effects of this illness when he reported at the Mills. The explanation offered by Venkatiah was therefore not accepted and he was not reinstated in the Company's service."

The Company further stated that the alternative evidence for sickness produced by Venkatiah had not up to then been accepted by the Corporation and that

" until the alternative evidence of sickness produced by this person is accepted by the Employees' State Insurance Corporation, we regret we cannot consider the question of reinstating Venkatiah."

On 5th June, 1957, the Regional Director wrote to the Company mentioning that the alternative evidence produced by Venkatiah had been accepted by the Corporation and asking the Company to reconsider Venkatiah's case for reinstatement. The Company sent a long reply on 12th June, 1957, which ended as following :

> " Before we take a final decision in this matter we shall be grateful if you would let us know the extraordinary circumstances under which the alternative evidence of sickness produced by the above-mentioned insured person was accepted by you, despite the failure of the insured person to comply with your instructions regarding alternative evidence of sickness."

In answer to this the Regional Director wrote on 22nd September, 1957, as follows :

> "As regards the circumstances under which the alternative evidence of sickness produced by the above-mentioned insured person was accepted, I have to observe that it is at the discretion of the Corporation either to accept or reject any alternative evidence of incapacity produced by an insured person and the *Corporation cannot disclose the grounds on which it was accepted.*"

On 5th September, 1957, the Company finally replied in these terms :—

> " According to the Company's Standing Orders which lay down the conditions of service of all our employees, any employee who is deemed to have left the Company's service due to absence for eight consecutive working days cannot be reinstated unless he gives an explanation *to the satisfaction of the Management.* In this particular instance the employee has been deemed to have left the Company's service due to absence for eight consecutive working days and as the Management is not satisfied with the explanation given by the employee for his absence, we regret we cannot reinstate him ".

Meantime, that is to say, on 5th June, 1957, Venkatiah was sanctioned payment of sickness benefit for the period covered by the certificate which he produced from Dr. Narasimha Rao, Civil Assistant Surgeon, Kanigiri.

As the Company refused to take back Venkatiah an industrial dispute was raised and on 26th March, 1958, the Government referred the following questions for adjudication to the Labour Court :

> " (i) Whether the discharge of Venkatiah, C. M. Spinning No. 699 is justified and to what relief he is entitled?
>
> (ii) Computation of relief, if any awarded, in terms of money if it can be so computed."

On 24th July, 1958, the Labour Court passed an order directing the reinstatement of Venkatiah. The present petition has been filed for the issue of an appropriate writ to quash this order of the Labour Court.

It is not disputed that the leave of Venkatiah expired on 19th January, 1957. He did not rejoin duty on that date. Nor did he apply for extension of leave. In fact till March, 1957, the Company heard nothing at all from him. This is, therefore, a case to which Standing Order 8 (ii) of the Company directly applied. That rule provides that if an employee is absent for eight consecutive working days without leave it shall be deemed that he left the Company's service without notice thereby terminating his contract of service. If he was ill and proved that fact to the satisfaction of the Management he was entitled to have his absence converted into medical leave for such period as he was eligible. The point to note here is that it is the Management that has to be satisfied that Venkatiah was really ill, not the Employees' State Insurance Corporation or other outside authorities. The Management was not bound to accept the medical certificate which Venkatiah produced. In the present case they sent Venkatiah to their Chief Medical Officer who reported that he could not confirm that Venkatiah had been ill for two months. Obviously if he had been ill with malaria and dysentery from 15th January, 1957, till 7th March, 1957, his condition must have been obvious to the medical officer who examined him on 22nd March, 1957. The Company was entitled to say that it did not believe the explanation of Venkatiah and was not prepared to act on the certificate he produced. It was argued that the evidence which Venkatiah produced was accepted by the Employees' State Insurance Corporation but as I said before the Company was not bound to accept the views of the Corporation. I notice that the Company asked for elucidation of the circum-

stances under which the alternative evidence of sickness produced by Venkatiah was accepted but the information was refused. The Company was merely told that it was in the discretion of the Corporation either to accept or reject the alternative evidence produced. The Company was also told in clear terms that the Corporation could not disclose the grounds on which the alternative evidence was accepted. In that position the Company was entitled to prefer the opinion of its own medical officer.

The Labour Court which ultimately found for Venkatiah observed :

> "There is absolutely no ground to hold that the Chief Medical Officer did not properly examine Venkatiah and that the examination was highly superficial and flimsy. It is nowhere laid down what all a medical officer should do before giving his opinion. It is easy to attack the opinion of a responsible medical officer and I am not inclined to accept the correctness of the criticism in the absence of any strong evidence to prove that the officer was prejudicial against this worker and was motivated with the idea of victimization. I am not prepared to accept the interested oral evidence of Venkatiah."

It seems to me that on this finding the Labour Court should have rejected the claim made on behalf of Venkatiah.

But it was contended that even so the action of the Company in refusing to reinstate Venkatiah constitutes a contravention of section 73 of the Employees' State Insurance Act of 1948. That section runs :

> "(1) No employer shall dismiss, discharge, or reduce or otherwise punish an employee during the period the employee is in receipt of sickness benefit or maternity benefit, nor shall he, except as provided under the regulations, dismiss, discharge or reduce or otherwise punish an employee during the period he is in receipt of disablement benefit for temporary disablement or is under medical treatment for sickness or is absent from work as a result of illness duly certified in accordance with the regulations to arise out of pregnancy or confinement, rendering the employee unfit for work.
>
> (2) No notice of dismissal or discharge or reduction given to an employee during the period specified in sub-section (1) shall be valid or operative."

It is observed that the Labour Court had difficulty in bringing the case directly within the terms of the section. So it observed :

> " As section 73 is intended to confer benefit upon the workers I think it cannot be strictly construed and the section must be interpreted somewhat liberally."

I do not think that this is a correct way of interpreting a statute. The normal way of construing an enactment is to take the words as they are written in the Act and to try to find out what they mean subject of course to the well-established canons of interpretation. Questions of sympathy, bias, predilection, prejudice or liberality are, every one of them out of place. If we read the words of section 73 as they stand it will be found that what the section does is this. It prohibits an employer from dismissing, discharging or punishing an employee during any one of the following periods : (1) during the period the employee is in receipt of sickness benefit or maternity benefit. I would point out that what the section says is that an employee shall not be punished during the period he is in receipt. . . . . of sickness or maternity benefit and not that he should not be punished during the period in respect of which he is in receipt of sickness or maternity benefit ; (2) during the period he is in receipt of disablement benefit ; (3) during the period he is under medical treatment for sickness ; (4) during the period he is absent from work as a result of illness duly certified in accordance with the regulations to have arisen in certain circumstances. The first remark to make here is that the Company passed no order discharging Venkatiah. His discharge was automatically brought about in accordance with the terms of the Standing Orders by his own absence from duty. Venkatiah was not discharged during the period he was in receipt of sickness benefit; he was not discharged during the period he was in receipt of disablement benefit ; he was not discharged when he was absent from work as a result of illness in respect of which the certificate referred to in the section has been produced. But it was argued that he was discharged when he was under medical treatment for sickness and that therefore section 73 applies. Whether he was actually ill or not we do not know. He produced a certificate from Dr. Narasimha Rao. But that certificate the Company declined to accept. No evidence was produced before the Labour Court to show that during the period in question Venkatiah was actually

ill. Nor does it appear that this point was taken before the Labour Court. So the allegation of fact on which this argument was based remains unproved.

I have already mentioned that section 73 would apply only where an employer does some positive act dismissing, discharging, reducing or otherwise punishing an employee. Mr. Dolia, the learned counsel for Venkatiah, however, argued that the section would apply even to cases like the present where there is an automatic termination of the service of an employee in accordance with the Standing Orders of the Management. The first answer to that is that it is difficult to reconcile this view with the positive words of the section which begins :

"No employer shall dismiss, discharge......etc."

These words require that the employer should have done some positive act before this section can apply. There is an even stronger argument against the contention of Mr. Dolia on this point. Section 85 (*d*) provides that if any person in contravention of section 73 or any regulation dismisses, discharges, reduces or otherwise punishes an employee he may be sentenced to imprisonment which may extend to three months or with fine which may extend to Rs. 500 or with both. If we take the view that an automatic termination of the services of an employee in accordance with the Standing Orders on the subject attracts the operation of section 73, then we would get this strange result. An employee may absent himself without leave for more than eight consecutive working days. He may have been really ill during the period. But if he does not apply for leave, the Standing Orders would take effect and his services would be terminated. Since according to Mr. Dolia this amounts to a discharge under section 73, the employer can be sent to jail under section 85-D. A construction that produces such a result cannot obviously be accepted.

Mr. Dolia next argued that it was within the competence of the Labour Court to decide whether the action of the Management in declining to accept the evidence produced by Venkatiah was proper. Assuming that as a legal proposition this is correct—I am not saying that it is—the fact still remains that the Labour Court has not said that the action of the Management declining to accept the certificate produced by Venkatiah was improper. On the other hand its observations in paragraph 12 which I have extracted above indicate that it accepted the *bona fides* of the medical officer of the Company.

It seems to me to be clear that the Labour Court made the order it did more on grounds of sympathy for Venkatiah than the merits of the case. It does not seem to have had any doubts that section 73 is inapplicable to the present case. As I said before the employee clearly overstayed his leave. The explanation he produced, namely, that he was ill was not accepted by the Management. In view of the report of their own medical officer, the Company was entitled to take the view it did. There was no scope for interference by the Labour Court, and in my opinion the Labour Court was not justified in interfering in this matter.

In the result this writ petition is allowed and the order complained of quashed. There will be no order as to costs.

V.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

H. M. Abdul Rahim Sait .. *Appellants**

v.

K. V. Kunhalan Kutty .. *Respondents.*

Sale of Goods Act (III of 1930), *section* 21—*Specific goods to be put into deliverable state—Sale of trees after felling —Property in the goods—When passes—Breach of express warranty—Rights of the buyer.*

The property sold was not the trees on the site on which they stood but the severed trees and the contract contemplated severance by felling only subsequent to the contract. Under section 21 of the Sale of Goods Act the property in the movables would not pass to the buyer until the seller did something to the goods for the purpose of putting them into a deliverable state, *viz.*, the seller having been bound to refrain from causing any obstruction either by himself or through his successors-in-interest. Where there is breach committed by the seller in this, then the buyer is not bound to reimburse the sale price to the seller.

Where the contract was entered into by the buyer with the seller that the seller would co-operate with him in obtaining the necessary permission of the Collector for cutting the trees and where the seller had failed to do so, then the seller would be bound, to refund the money that he had received from the buyer.

Appeals respectively against the Decrees of the District Court of Coimbatore, in Appeal Suits Nos. 450 and 451 of 1953 preferred respectively against the Decrees of the Court of the Subordinate Judge of Ootacamund, in Original Suit Nos. 247 and 74 of 1951.

A. K. Sreeraman, for Appellant.

T. R. Sangameswara Ayyar, for Respondent.

The Court delivered the following

JUDGMENT.—These are two connected appeals preferred against the decrees and judgment of the learned District Judge of Coimbatore in A.S. Nos. 450 and 451 of 1953, reversing the decrees and judgment of the learned Subordinate Judge of Ootacamund in O.S. Nos. 74 of 1951 and 247 of 1952.

The appellant before us Khan Bahadur H. M. Abdul Rahim Sait was the owner of the Salisbury Estate. There were trees in the jungly and uncultivated area of this estate. The respondent before us K. V. Kunhalan Kutty is a Moplah eking out this livelihood by purchasing trees, felling them and vending the same. He entered into a contract with this appellant for purchasing 681 trees under Exhibits B-4 and B-5, dated 28th August, 1950 and 21st September, 1950, respectively. On the date of Exhibit B-4 an advance of Rs. 1,000 was paid by the respondent to the appellant. The trees to be purchased were selected by the respondent and his men in the presence of D.W. 1, R. J. Peter, the manager in the employ of the appellant then. The appellant had instructed his manager to prepare a list containing all particulars and Exhibit B-1 is the list of the trees to be felled and marked with chisel marks. The aggregate sale price was Rs. 6,483-8-0. The trees so marked stood inside and outside S.No. 70/6. S.No. 70/6 had been notified as a private forest coming under the purview of the Madras Preservation of Private Forests Act as amended. The parties were aware at the time of entering into this contract that the previous permission of the Collector was necessary for cutting the trees in the forest area, and clause (*a*) (1) of the conditions makes the same explicit. The appellant had undertaken under Exhibits B-4 and B-5 to do all acts necessary for helping the respondent in obtaining the necessary permission from the Collector. On the date of Exhibit B-5 a sum of Rs. 1,483-8-0 was paid and the balance of Rs. 4,000 was agreed to be paid in two instalments of Rs. 2,000 each as per condition 1(*a*) and 1(*b*) in Exhibit B-5. At the time of Exhibit B-4 the estate belonged to the appellant in leasehold right, the Jenmi being the Nilambur Kovilagam, and there was no intention ex-

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* S.A. Nos. 994 and 995 of 1956. 15th October, 1958.
(23rd Asvina, 1880—Saka.)

pressed at that stage to sell the estate in particular to any person. Clause (6) of Exhibit B-4, however, adverted to the respondent being entitled to remove only such trees as were felled by him till the date of the sale if effected by appellant and that the balance amount would be refunded to the respondent.

After the date of Exhibit B-4, the appellant entered into an agreement of sale of the estate with one Suseela Anandan and others and it was expressly agreed that the respondent should have one year's time from 21st September, 1950, the date of Exhibit B-5, for cutting, stocking and removing the trees enumerated and described in Schedule 2 of Exhibit B-5. It was also agreed that the purchasers should give all facilities to the respondent for cutting, stocking and removing the trees from the estate. Subsequently on 20th October, 1950, the estate was sold by the appellant under the original of Exhibit B-24 and it was stipulated under the said sale that the respondent should have time till 20th October, 1951, for exploiting his contract.

Then three things happened, concerning which there can be no dispute. The respondent was able to cut and remove peacefully only 190 trees in the area outside S. No. 70/6. But he was unable to cut the remaining 104 trees standing thereon owing to the obstruction of the subsequent purchasers of the estate. After the sale under Exhibit B-24, the manager of the estate under Suseela Anandan and others started cultivation. Exhibits B-6, B-12 and B-16 clearly show that the said manager V. A. Krishnan Kutty obstructed the respondent from cutting the 104 trees which originally stood in the uncultivated area and which was later on brought under cultivation by the said manager. Then in regard to the 387 trees standing inside S. No. 70/6, the respondent made all efforts to secure the permission from the Collector. The appellant, who had parted with the property, when the respondent was clamouring for his assistance to get the permission of the Collector, loftily told him that " If any enquiry comes from the Collector, I will certainly help you as far as I can" : *vide* Exhibit B-13, dated 23rd December, 1950. There is no dispute that the Collector's permission was not forthcoming and the trees to be cut stand there even now. In other words, out of 681 trees purchased by this respondent, he was able to cut only 190 trees. He could not cut 104 trees owing to the obstruction of the purchasers of the estate and 387 trees could not be cut, because the Collector would not give the permission. The respondent by this time had paid out of the purchase price of Rs. 6,483-8-0, Rs. 1,000 by way of advance on the date of Exhibit B-4, Rs. 1,483-8-0 on the date of Exhibit B-5 and Rs. 1,000 on 23rd December, 1950. It is common ground that the value of 190 trees cut is Rs. 1,802-8-0.

In these circumstances, the appellant and the respondent filed cross-suits. The appellant's suit O.S. 74 of 1951 was filed on the allegation that for the 681 trees sold to the respondent for Rs. 6,483-8-0, he had received only Rs.3,483-8-0 and that the respondent is liable to pay him Rs.3,142-4-0, which includes the interest on the balance and for which amount the suit was laid. The defence of the respondent was his claim in the cross-suit O.S.No.247 of 1952, *viz.*, that he was bound to pay the appellant only for the 190 trees cut valued at Rs.1,802-8-0 that, as a matter of fact, he had paid Rs. 3,483-8-0 and that therfore the appellant is liable to refund to him Rs.1,681 for which the said suit was laid.

The learned Subordinate Judge upheld the contention of the appellant and dereed his suit and dismissed the respondent's suit. On appeal the learned District Judge upheld the contention of the respondent and decreed his suit and dismissed the appellant's suit. The defeated Khan Bahadur Abdul Rahim has preferred these two second appelas against the said decision of the learned District Judge.

In these Second Appeals I am of the same opinion as the learned District Judge and here are my reasons.

The two points which fall for determination are: whether the respondent is bound to pay for the 104 trees standing in the uncultivated area and which trees he was prevented from felling and removing by the purchasers of the estate and which the appellant did not in any way prevent and assure quiet possession for the respondent ; and secondly, whether the respondent is liable to pay for the 387 trees standing inside S.No.70/6 and for which respondent could not get the permission of the Collector for felling and removing.

Point 1:—The property sold in this case by the appellant to the respondent was not the trees on the site on which they stood but the severed trees. Therefore, the property sold being admittedly movables, the contract in respect of the same also is governed and controlled by the provisions of the Sale of Goods Act. The contract contemplates severance by felling only subsequent to the contract. In other words, the trees were not in a deliverable state and the property in the trees did not pass on the date of the contract, *viz.*, Exhibits B-4 and B-5; see section 20 of the Sale of Goods Act, which enacts that in an unconditional contract of sale of goods in a deliverable state, the property in the goods passes to the buyer when the contract is made and that it is immaterial whether time of the payment of the price or the time of the delivery of the goods or both is postponed. Section 21 of the Sale of Goods Act supports the view that the property in the 104 trees did not pass to the respondent. The seller, *viz.*, the appellant having been bound to do something to the trees for the purpose of putting them into a deliverable state *viz.*, the appellant having been bound to refrain and from causing any obstruction either by himself or through his successors-in-interest he having committed default in this respect, the 104 trees cannot be deemed to have been put into a deliverable state. On that foot, there being a breach of the contract by the appellant, the properties in the 104 trees did not pass to the respondent. Therefore, the respondent is not bound to reimburse the sale price to the appellant. This can also be looked at from another angle. Section 14 (*b*) of the Sale of Goods Act lays down that in a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is amongst others an implied warranty that the buyer *shall have* and *enjoy quiet possession* of the goods. "Shall have" implies that the buyer shall be put in possession as part of the contract of sale. "Shall enjoy" implies that his possession shall not be disturbed afterwards either by the seller or any person claiming through him or even by a third person claiming under a title paramount: Benjamin on Sale, p. 207, Halsbury's Laws of England, Hailsham edition, volume 29, page 59; Dayal, Indian Sale of Goods Act, p. 80. Exhibits B-4 and B-5 to which reference has already been made, show that there was an express warranty that the buyer, *viz.*, the respondent, should have and enjoy quiet possession of the trees. It is common ground that the respondent was not allowed to have and enjoy quiet possession of the 104 trees by reason of the unlawful obstruction of the purchasers of the estate from the appellant. This appellant had not lifted his little finger to assure the respondent to have and enjoy quiet possession of the goods in these 104 trees. On the other hand, it is stated the Khan Bahadur ordered and abetted the purchasers in their unlawful acts as seen from Exhibit B-11. The appellant thereby failed to afford all facilities through his successors in interest for the cutting, stocking and removal of the trees and at the time of Exhibits B-4 and B-5 Kutti did not know that the cutting, etc., would become impossible. Thereupon the Khan Bahadur became liable to compensate Kutti for the loss sustained through the appellant's non-performance of his promise thereby attracting para. (3) of section 56, Indian Contract Act. The rights and liabilities of the parties are governed by sections 56 and 65 of Indian Contract Act. Therefore, there was a breach by the appellant of this warranty both under the contract and under law. On that the consequences laid down in section 59 (1) (*a*) of the Sale of Goods Act will follow. That section expressly lays down that where there is a breach of warranty by the seller or where the buyer elects or is compelled to treat any breach of a condition on the part of a seller as breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods, but he may set up against the seller the breach of warranty in diminution or extinction of the price. Similarly under the provisions of the Sale of Goods Act wherein sections 11 to 17 constitute a complete enunciation of the rules relating to warranties and conditions, a remedy lies for refund or damages, etc. *Rowland* v. *Dwall*[1]; *Kissanchand* v. *Ram Pratap*[2], *Echboz* v. *Bannister*[3], analogous law, section 59 (1) (*a*) of English Sale of Goods Act; American Law 3, Williston Benjamin on Sale, p. 984 (1950 edn.) It may be noted that this respondent was ready and willing

1. L.R. (1923) 2 K.B. 500.
2. 44 C.W.N. 505.
3. (1864) 34 L.J. C.P. 105.

to perform his part of the contract to cut and carry away the trees. In fact it was to his advantage to do so. It was the appellant who had given an express warranty, who failed to assure the respondent quiet possession of the goods. Therefore, the appellant cannot have the cake and eat it too. In regard to the value of the 104 trees, the remedy of the appellant only lies against the purchasers of the estate and not against this respondent and it is significanct that this appellant has not even impleaded the subsequent purchasers of the estate in his suit. Therefore, Point 1 has been rightly decided by the learned District Judge against the appellant and his claim in regard to the 104 trees must fail.

Point 2:—Turning to the 387 trees, the claim of the appellant is on a worse footing. On the date when the appellant entered into the contract with the respondent, the appellant knew full well the provisions of the Madras Preservation of Private Forests Act, covering these trees standing in S. No. 70/6 and which has been notified as a private forest. The contract has been entered into by the respondent with the appellant on the explicit understanding that the appellant will co-operate with him and obtain for him the necessary permission from the Collector and this has been expressly stated in Exhibits B-4 and B-5. But notwithstanding all the efforts made by this respondent to obtain the permission of the Collector, as the correspondence filed shows, he failed to secure the same. The frantic efforts made by him to obtain the appellant's co-operation to obtain the permission of the Collector were rewarded only by the lofty sentiment expressed by this appellant that if any enquiry came from the Collector he would certainly help the respondent as far as he could. There can be no doubt that looked at from any point of view, this appellant is not entitled to recover the purchase price of 387 trees. Exhibits B-10 and B-13 disclose that in spite of the respondent's endeavours permission of the Collector was not granted. Exhibit B-14 shows that the advocates of the Manager of the purchasers of the estate complained to the Collector regarding the cutting of the trees and called upon the respondent to refrain from cutting on the ground that the sale of trees in the forest area without the previous sanction of the Collector was void. The *Explanation* to section 3 (1) (*a*) of the Madras Preservation of Private Forests Act (XXVII of 1949) is explicit. After prohibiting the sale, mortgage, lease or other alienations of the whole or any portion of any forest, the *Explanation* exempts the sale or other dealing with the right to gather and remove forest produce, other than trees and timber, in the usual or customary manner for a period not exceeding two years. The Revisional Side of this Court has been replete with prosecutions by Collectors for felling timber in private forests without the previous permission of the Collector. In fact a proper construction of the *Explanation* to section 3 (1) (*a*) would leave no room to doubt that there can be no sale of trees and timber falling within the purview of the said Act without the previous sanction of the Collector, and which is not the case here. In any event, the agreement entered into by the respondent in regard to the 387 trees must be construed in the following manner, *viz.*, that the obtaining of the permission of the Collector is a condition precedent to the payment of the price. Otherwise, we would be circumventing the Act and assuring the appellant payment for sale of property to which he would not be entitled but for the permission given by the Collector rendering the trees and timber saleable. The provisions of sections 56 and 65 of the Indian Contract Act would be attracted to non-suit the appellant and enable the respondent to claim back the advantage which the appellant had derived; (See the discussion in Chitaley and Appu Rao's Contract Act, Vol. III (Corpus Juris of India), section 56 Notes 1 and 2 and 4 & 5 and 9 to 12 and section 65 Note 4, whereunder the entire case-law is set out analytically and exhaustively). The appellant would be bound to restore the said advantage or make compensation for the same to the respondent from whom he had received the money. Every contract should be supported by consideration and there should be *quid pro quo* or return benefit for a contract to become enforceable. In regard to 387 trees admittedly there was no return benefit to the respondent. In regard to the prerequisite for the sale of these 387 trees, *viz.*, the appellant undertaking that he would afford all facilities to the respondent for cutting, stocking and removing the trees from the land, it was not admittedly fulfilled by the appellant and on that ground also the contract in regard to the same must

fail. Therefore looked at from any point of view the case of the appellant in regard to the recovery of the price of the 387 trees must also fail and the conclusion of the learned District Judge is right.

On these conclusions it follows, that the respondent will be entitled to a refund of the amount claimed in his suit.

The net result of the analysis is that the decrees and judgment of the learned District Judge are irreproachable and they are confirmed and these Second Appeals are dismissed with costs, one set. No leave.

V.S. — *Second Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Serandaya Pillai and another .. *Appellants**

v.

Sankaralingam Pillai and another .. *Respondents.*

Transfer of Property Act (IV of 1882), *section* 9—*Scope—Oral transfer—Contract to settle property in consideration of marriage—If the transfer should be in writing and registered—Registratioh Act (XVI of* 1908), *section* 17.

The contract entered into by the plaintiffs with the first defendant was that in consideration of the first defendant marrying their sister some properties would be settled upon him. The marriage took place and the defendants were put in possession of the property. The plaintiffs asked for declaration and injunction or in the alternative for recovery of possession on the ground that the gift was invalid being hit by section 123 of Transfer of Property Act and section 17 of the Registration Act.

Held : The transaction entered into by the parties was neither a sale, nor a lease nor an exchange, nor a gift. This transaction fell within the scope of section 9 of the Transfer of Property Act and required no writing and no registration.

By reason of the subsisting and enforceable contract on the date of the suit the plaintiffs would be barred from obtaining the relief of declaration or recovery of possession.

Case-law exhaustively discussed.

Appeal against the Decree of the Court of the Principal Subordinate Judge of Tirunelveli in Appeal Suit No. 21 of 1955 preferred against the Decree of the Court of the District Munsif of Tuticorin in Original Suit No. 42 of 1953.

S. Kothandarama Nainar, for Appellants.

V. Ratnam, for Respondents.

The Court delivered the following

JUDGMENT.—This Second Appeal is preferred against the decree and judgment of the learned Subordinate Judge, Tirunelveli, in A.S. No. 21 of 1955, reversing the decree and judgment of the learned District Munsif of Tuticorin in O.S. No. 42 of 1953.

The plaintiffs are the uterine brothers of the second defendant Gnanamuthammal whose husband is the first defendant. The father of plaintiffs and the second defendant died when the second defendant was very young. The second defendant has been brought up by the plaintiffs. The second defendant, not to put too fine a point on it, seems to have grown up into an ugly black woman. Therefore, eligible bridegrooms were not forthcoming to marry her. In fact she remained a comparatively old spinster till she was aged 28. In fact in this community of Nangudi Vellalas of Srivaikuntam, it is very unusual for a girl to remain unmarried till she becomes middle-aged. The plaintiffs finally selected the first defendant. They had to offer him special terms over and above the customary gift of a small extent of immovable property, which is prevalent in this community of Nangudi Vellalas and which custom is affirmatively found by both the Courts below and which is perfectly legal and

* S.A. No. 1033 of 1955. 30th September, 1958. (8th Asvina, 1880-Saka).

valid ; Vide *Palwanna Nadar* v. *Annamalai Ammal*[1]. In other words, the plaintiffs entered into a contract with the first defendant, the conideration for which was the marriage of the first defendant with the second defendant who was not exactly a catch in the marriage market, to settle upon them 74 cents of land bearing survey No. 362 and comprised in patta No. 471 and called Veppal Vayal situated in the village of Keelapadugai in Srivaikuntam Taluk. In pursuance of this contract the marriage took place in Avani of 1123 Andu (1947) and the defendants were put in possession of the land and they have filed Exhibits B-5 and B-6 for payment of kist in the name of the second defendant for the years 1948 and 1949 in respect of the suit land. Subsequently, the parties had fallen out and the plaintiffs were evasively putting off the execution of a registered instrument in favour of the defendants and what is more they have been claiming back the land on the ground that the gift was invalid being hit by section 123 of the Transfer of Property Act and section 17 of the Registration Act and that it is not open to the transferees to plead part-performance. On the other hand, the case for the defendants was that first of all this is a transaction contemplated under section 9 of the Transfer of Property Act and need not be registered ; and secondly, by virtue of there being a subsisting enforceable contract between themselves and the plaintiff, the plaintiffs, are not entitled to the declaration and injunction or in the alternative for recovery of posession asked for. The learned District Munsif upheld the contention of the defendants and dismissed the suit. On appeal the learned Subordinate Judge found that this was an unjust claim but that the plaintiffs were entitled to the relief asked for as the gift is also a transaction hit by section 123 of the Transfer of Property Act and section 17 of the Registration Act. Therefore he allowed the appeal and decreed the suit. The defeated defendants have preferred this Second Appeal.

The scope of section 9 of the Transfer of Property Act has been well explained in the A.I.R. Commentaries (Third Edn.) at page 361. It is a general principle of law that everything is to be taken as permissible unless there is a prohibition against it. Where, therefore, a transaction is not required by law to be in writing, it may be brought about without writing. Section 9 is an enactment of this principle in so far as transfers of property are concerned, and seems to have been inserted *ex abundanti cautela* in view of a different principle as to transfers of property, adopted in England. Under the Statute of Frauds in England the general rule adopted was that all transfers of property should be in writing, while the general rule and policy adopted by the Legislature in this country, as shown by section 9, is that all transfers of property may be without writing unless they are expressly required by law to be in writing. The test therefore in this country, to determine whether a transaction (be it a transfer or not) can be made without writing is to see if it is expressly required by law to be in writing. If the transaction is a "transfer of property" and there is no express provision of law requiring it to be in writing, section 9 will enable it to be made without writing. If, on the other hand, the transaction is not a "transfer of property" and there is no express provision of law requiring it to be in writing the general principle referred to above will enable it to be validly made without writing. (*Muhammad Sulaiman Khan* v. *Yar Khan*[2], *Arumugham* v. *Subramaniam*[3] *Bhuta Singh* v. *Mangu*[4].

In *Ariyaputhra Padayachi* v. *Muthukumaraswamy Padayachi*[5], it was observed by Sadasiva Iyer, J., that all transfers *inter vivos* were intended to be included in one or other of the transactions coming under the heads of "sale", "mortgage", "lease", "exchange", and "gift"; in other words, that the Transfer of Property Act is exhaustive of all modes of transfer. This view has not, however, been followed, see *Bishan Dial* v. *Gazinuddin*[6], *Madam Pillai* v. *Badrakali*[7], *Fowler* v. *Secretary of State*[8], *Jiwan Lal* v. *Chudaman*[9], *Tehilram* v. *Longin*[10], *Ali Hussain* v. *Jonabali*[11], *Gunniah* v. *Gopal*[12],

1. (1957) 1 M.L.J. 238.
2. (1889) All.W.N. 55 (F.B.).
3. (1937) 1 M.L.J. 679 : I.L.R. (1937) Mad. 638 : A.I.R. 1937 Mad. 882 (F.B.).
4. A.I.R. 1930 Lah. 9.
5. A.I.R. 1914 Mad. 423.
6. (1901) 23 All. 175.
7. (1922) 42 M.L.J. 410 : I.L.R. 45 Mad 612: A.I.R. 1922 Mad. 311.
8. (1920) 13 L.W. 230. at 245.
9. A.I.R. 1914 Nag. 54.
10. A.I.R. 1916 Bom. 77.
11. A.I.R. 1936 Cal. 770.
12. A.I.R. 1919 Mad. 547.

Jagdes v. *Ramsaran*[1], the general trend of opinion being that the Act is not exhaustive of all modes of transfer. It has accordingly been held that a transfer by an award, a pledge of moveable property, Government Promissory Notes and Policies of Insurance and the like are all transfers of property but they would not fall under any of the heads of "sale", "morgage", "lease", "exchange", or "gift": *Bhagwatibai* v. *Bhagwandas*[2], *Amir Bibi* v. *Arokiam*[3]; *Subbaraya Rowthu Minda Nainar* v. *Kuppuswamy Aiyangar*[4].

To sum up, in the language of Mulla's Transfer of Property Act (4th Edition) page 884 :

" Writing was not necessary under Hindu law to the validity of any transfer whatsoever, and in all ancient systems of law transfer of possession was the only requisite to the transfer of title. The present Act makes writing necessary in the case of a sale of tangible immovable property of the value of Rs. 100 or upwards, or the sale of a reversion or other intangible thing—section 54 ; in the case of a simple mortgage, and in the case of all other mortgages (except a mortgage by deposit of title deeds) when the principal sum secured is Rs. 100 or upwards—section 59 ; in the case of a lease if it is from year to year, or for any term exceeding one year or reserving a yearly rent—section 107 ; and in the case of all gifts of immovable property—section 123, and of all transfers of actionable claims—section 130. Exchanges are subject to the same rule as sales—section 118 ; and the law as to leases is subject to rules which the Local Government are empowered to make—sections 107 and 117 ".

Thus, in the case of several types of transactions writing has been held to be not necessary. The following are some of the examples given in B.B. Mitra's Transfer of Property Act (11th Edition) page 103. A relinquishment or surrender by a Government ryot to the Government of the properties included in his patta is neither a mortgage nor a sale, nor a gift, nor a lease, as defined in the Transfer of Property Act and is not by law required to be in writing or in any of the modes prescribed by the said Act : *Fowler*v. *Secretary of State*[5]. Similarly, relinquishment or surrender by a limited owner under the Hindu Law may be effected by any voluntary act which may operate as her civil death. *Mt. Akhaj* v. *Arjun Koeri*[6]. A surrender of a lease is not a transfer and need not be in writing : *Brojonath* v. *Maheshwar*[7] ; *Elias Meyer* v. *Monoranjan*[8]. A transfer made in compromise of a claim is neither a sale, nor a gift, nor an exchange and no writing is necessary under the Transfer of Property Act to validate the same, though such transfer may relate to immovable property : *Thiruvengada Chariar* v. *Ranganatha*[9]. A partition of joint family property is not an exchange and is not by law required to be in writing: *Satya Kumar* v. *Satya Kripal*[10], *Ma Sein Nyun* v. *Maung U*[11]. The creation of an easement is not a transfer thereof, and therefore it can be created by oral agreement, without requiring any writing: *Sital Chandra* v. *Delaney*[12]. A grant of immoveable property by way of guzara, not being a grant of the corpus, but only of the right to enjoy the usufruct, need not necessarily be in writing : *Gajraj* v. *Indarpal*[13]. A transfer of land by a husband to be enjoyed by his wife during his lifetime in discharge of future maintenance is not a gift or a sale and may be made without writing : *Madam Pillai* v. *Badrakali Ammal*[14]. Where a purchase is made by a joint-decree-holder in his own name, other joint decree-holders are beneficially interested in the purchase and their right which is short of ownership can be relinquished without a written instrument: *Lal Singh* v. *Mt. Choley*[15]. There is no express provision of law that a charge can be created only by a document. Consequently a valid charge can be created orally. But if a charge is created by a document, it must be registered where the charge is for a sum in excess of Rs. 100: *Kuppuswamy* v. *Rasappa*,[16]

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1. A.I.R. 1927 Pat. 7.
2. A.I.R. 1927 Sind 206.
3. (1917) 34 M.L.J. 184 : A.I.R. 1919 Mad. 1113.
4. (1909) I.L.R. 34 Mad. 442.
5. (1920) 13 L.W. 230.
6. A.I.R. 1952 Pat. 67.
7. (1918) 28 C.L.J. 220.
8. (1918) 22 C.W.N. 441.
9. (1903) 13 M.L.J. 500.
10. (1909) 10 C.L.J. 503.
11. (1914) 25 I.C. 498.
12. (1916) 20 C.W.N. 1158.
13. (1918) 49 I.C. 406.
14. (1922) 42 M.L.J. 410: I.L.R. 45 Mad. 612 (F.B.).
15. A.I.R. 1933 All. 854.
16. A.I.R. 1936 Mad. 865.

To enable parties to an agreement to treat a sale as a mortgage by a subsequent agreement, no writing is necessary : *Narsingdas* v. *Radhakisan*[1]. In the case of oral gift or unregistered deed of gift accompanied by delivery of possession and allowing the donees to treat the property gifted as their absolute property the Rangoon and Calcutta High Courts on the principle of estoppel and that Courts will not lend themselves to promote frauds have dismissed suits of donors to take back the properties following : *Ma Htay* v. *U. Tha*[2], *M. P. L. M. P. Chetty* v. *Ma Ngwe*[3], *Ma Shin* v. *Maung*[4], *Pran Mohan* v. *Harimohan*[5] following *Mahomed Musa* v. *Agora Kumar*[6]. But it is a matter for consideration whether these cases are good law in view of *Ariff* v. *Jadunath*[7]. In the case of unregistered deed of gift it is not suspended until registration. It can be compulsorily registered (*Kalyanasundaram* v. *Karuppa*[8], *Venkata Subba* v. *Subba Rama*[9]. (*See* pages 119 and following of the 2nd edition of the lucid commentaries of the Indian Registration Act, section 17).

Bearing these principles in mind, if we examine the facts of this case, we find that the contract entered into by the plaintiffs with the first defendant for the consideration of his marrying the second defendant, is neither a sale, nor a lease, nor an exchange. The idea of gifting constituted only *the motive and must not be confused with the enforceable contract expressing the intention of the parties.* In other words, the motive of gifting was the root and the contract was the fruit. Therefore, this is a transaction which does not fall within the ambit of a sale, mortgage, lease, exchange or gift and for which a writing is necessary and which has got to be registered. This is a case which would fall within the principle laid down in *Madam Pillai* v. *Badrakali Ammal*[10]. This anomalous transaction falling within section 9, Transfer of Property Act and accompanied by delivery of possession cannot be nullified by alleging it is void because there is no writing registered.

This transaction will not otherwise also be void, because on the date of the filing of the suit, there is an enforceable contract subsisting between the parties. The contract has been freely entered into between the plaintiffs and the first defendant and there was good consideration. In *Narayana Nambudri* v. *Unnimaya Antharjanam*[11] it was held that a promise to pay a particular sum of money or to settle some property in consideration of the terms for marrying a daughter or equally well a sister of the promisor, is valid and enforceable and it is not immoral or opposed to public policy. This is also the English law. In Chitty on Contracts, (21st Edition), Vol. 1, page 398, it is stated :

> " It should be borne in mind, however, that a promise of marriage is a consideration, so that although a promise to marry is not specifically enforceable, an agreement to settle property in consideration of a promise to marry is ".

In England, as pointed by Chitty on Contracts, 21st Edition, Vol. 2, page 505 :

> "Contracts for settlement of property or otherwise made in consideration of marriage were by virtue of section 4 of the Statute of Frauds, 1677, unenforceable unless the agreement or some memorandum or note thereof was in writing, and signed by the party to be charged or his agent, but this provision has now been repealed"

by Law Reform (Enforcement of Contracts) Act, 1954 (2 and 3 Eliz. 2. C. 34) s. 1.

The contract in the present case was not vitiated by any of the invalidating circumstances vitiating a contract. There is also no question of bar of limitation. On the date of suit this oral and enforceable contract was subsisting. The evidence shows that in the natural and probable course of conduct the defendants have been asking the plaintiffs to execute and register an instrument. But the plaintiffs in the first instance have been putting it off and naturally defendants have not been

1. A.I.R. 1952 Bom. 425.
2. (1924) I.L.R. 2 Rang. 649 : A.I.R. 1925 Rang. 184.
3. A.I.R. 1924 Rang. 200.
4. A.I.R. 1924 Rang. 102.
5. A.I.R. 1925 Cal. 856.
6. (1915) I.L.R. 42 Cal. 801.
7. A.I.R. 1931 Pat. 79.
8. (1926) 52 M.L.J. 346 : A.I.R. 1927 P.C. 42: I.L.R. 50 Mad. 193: L.R. 54 I.A. 89 (P.C.).
9. (1928) 54 M.L.J. 573 : A.I.R. 1928 P.C. 86.
10. (1922) 42 M.L.J. 410 : I.L.R. 45 Mad. 612 (F.B.).
11. (1945) 1 M.L.J. 145.

hurrying the plaintiffs, because they were in possession and enjoyment of the property. Subsequently, apparently due to ill-feelings and probable increased straitened circumstances of the plaintiff's family, the plaintiffs have come to feel that they should not have made a gift of these 74 cents of land when they have come to possess only 90 other cents overlooking that what they put the defendants in possession was not the customary gift of a small extent of property usual on these occasions, but a considerable extent of land under a contract in pursuance of the special circumstances necessitating it. The plaintiffs have started thereupon the preliminary round of criminal litigation and then came to the civil Court. In other words, this suit is a counterblast to the possible litigation of the defendants pressing the plaintiffs to execute and register a document which the latter were successfully putting off by promising to do and which they could no longer put off. The claim of the plaintiffs for a declaration and injunction or in the alternative for recovery of possession, will be clearly unsustainable in the face of this enforceable subsisting contract. It is on this foot primarily that the learned District Munsif has dismissed the suit.

This is not a case of mere oral gift or an unregistered deed of gift. If that were so, the provisions of section 123 of the Transfer of Property Act being mandatory and imperative and no gift of immovable property can be made except by means of a registered instrument, the defendants, cannot resist the claim of the plaintiffs to take back the land however unjust their claim may be and however opposed it may be to the Sastraic principles exemplified in Manu's Text (ix-47) that

> "once is the partition of inheritance made, once is a damsel given in marriage, and once does a man say ' I give ', these three are by good men done once for all and irrevocably."

In such cases even the doctrine of part performance will not come to the aid of the donee. An agreement to make a gift is not capable of specific performance and therefore, part performance has no application. Besides, the rule of part performance enunciated in the new section 53-A of the Transfer of Property Act does not apply to a gift, because that section applies only to a transfer for consideration. The only defence open will be that if under the oral gift the donee remains in possession for more than 12 years, his title will be perfected by adverse possession and it will not be in the power of the donor to take back the property: *Varada Pillai* v. *Jeevaratnammal*[1].

The net result of this analysis is that the decision of the learned District Munsif is correct in that this transaction will fall firstly under section 9 of the Transfer of Property Act, and secondly, by reason of a subsisting and enforceable contract on the date of suit, the plaintiffs will be barred from obtaining the relief of declaration or recovery of possession. The decree and judgment of the learned Subordinate Judge are set aside and those of the learned District Munsif are restored.

This Second Appeal is allowed and in the circumstances without costs.

V.S. ——— *Second Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GANAPATHIA PILLAI.

Kanthimathi Mills, Ltd., Madras by Managing Director, M.S. Chockalingam Pillai .. *Appellant**

v.

Special Land Acquisition Officer for Co-operative Housing Schemes, Madras .. *Respondent.*

Civil Procedure Code (V of 1908), section 144—Restitution—Principle of—Applicability.

The basis of the rule of restitution is not making the unsuccessful party disgorge any profit he had made out of the decree that was reversed on appeal but giving compensation to the successful party in the appeal for the loss which he had suffered by obeying the decree of the lower Court. Upon this principle, where a party has been obliged to deposit a certain amount into Court by the lower

1. (1919) 38 M.L.J. 313 : L.R. 46 I.A. 285 : I.L.R. 43 Mad. 244 (P.C.).

*A.A.O. Nos. 41 and 42 of 1957. 20th March, 1959.

Court's order and the amount due by him has subsequently been reduced on appeal, it makes no difference to the applicability of the principle of restitution whether the original payment was made voluntarily or under threat of execution. Such a party would be entitled to claim interest by way of restitution, on the excess amount he was obliged to deposit by virtue of the decree of the lower Court.

Appeal against the Order of the Court of the Subordinate Judge, Tirunelveli, dated 31st August, 1956 and made in E.A. No. 124 of 1956 in O.P. No. 1 of 1949.

V. S. Ramakrishna, for Appellant.

The Government Pleader (*B. V. Viswanatha Ayyar*), *K. S. Ramamurthi* and *T. R. Mani*, for Respondent.

The Court delivered the following

JUDGMENT.—The appellants in these two C.M.As. are the Kanthimathi Mills, Ltd., through its Managing Director, and the only respondent in C.M.A. No. 41 of 1957 and the first respondent in C.M.A. No. 42 of 1957 is the Special Land Acquisition Officer for Co-operative Housing Schemes, Madras. There are three other respondents in C.M.A. No. 42 of 1957, who gave security on behalf of the appellant for withdrawing a portion of the decree amount in O.P. No. 1 of 1949.

C.M.A. No. 41 of 1957 arises out of E.A. No. 124 of 1956 and C.M.A. No. 42 of 1957 arises out of E.A. No. 75 of 1956, both filed in O.P. No. 1 of 1949 on the file of the Court of the Subordinate Judge, Tirunelveli O.P. No 1 of 1949 was instituted by the Kanthimathi Mills, Ltd., under section 18 of the Land Acquisition Act, claiming enhanced compensation for its land acquired by the Special Land Acquisition Office for Co-operative Housing Schemes. By the order in that O.P. the Subordinate Judge awarded enhanced compensation of Rs. 35,643-9-0 on 3rd September, 1949, with interest at 6 per cent. per annum on that amount from 30th June, 1948. Against that decree, the Special Land Acquisition Officer filed A.S. No. 195 of 1950 in this Court.

During the pendency of that appeal, the Land Acquisition Officer applied in C.M.P. No. 3122 of 1950 for stay of execution of the decree of the Subordinate Judge. That petition was ordered by Somasundaram, J., on 17th August, 1950, directing the Government to deposit the amount decreed by the Subordinate Judge and giving liberty to the claimant decree-holder to withdraw that amount on furnishing security. The total amount due under the decree of the Subordinate Judge amounted to Rs. 40,366-5-0 on 20th September, 1950, the date on which the Government deposited this amount in the Court of the Subordinate Judge. On 7th July, 1951, on the security furnished by respondents 2 to 4 in C.M.A. No. 42 of 1957, the decree-holder was permitted to withdraw Rs. 26,500 from the amount in Court-deposit. Subsequently, that is, on 21st October, 1954, the sureties applied to the Court to release one item of property given by them as security and, for this purpose, they re-deposited Rs. 15,000 into Court. The Court allowed this item of property to be released and accepted the re-deposit. This Court in A.S. No. 195 of 1950 reduced the amount of compensation to Rs. 15,576-0-10. Thereafter, the Special Land Acquisition Officer filed E.A. No. 75 of 1956, claiming interest on Rs. 20,067-8-2 by way of restitution from 20th September, 1950, till date of payment, and sought an order, directing respondents 2 to 4 to that application, namely, the sureties, to deposit into Court the sum of Rs. 6,421-9-7 for payment to the petitioner or to assign to the petitioner the security bond dated 17th June, 1951, given to Court by respondents 2 to 4 to enable the petitioner to realise the amount due by the sureties from the secured property. Shortly after E.A. No. 75 of 1956 was filed by the Land Acquisition Officer, the claimant-Mills filed E.A. No. 124 of 1956 for an order directing the Government to make payment to them of Rs. 909-13-0 with further interest thereon from 5th December, 1955 till payment. This amount was claimed under the following circumstances. Rs. 11,500 had been already drawn by the claimant through his sureties, that is, Rs. 26,500 originally drawn through

the sureties minus Rs. 15,000 re-deposited by them. In E.A. No. 264 of 1955 the petitioner withdrew from the amount in Court-deposit a sum of Rs. 4,284-14-5 on 5th December, 1955. It was alleged that this sum of Rs. 4,284-14-5 was claimed as the only sum due to the claimant under the mistaken belief that interest ceased to run on the amount deposited by the Government from the date of deposit. It was also alleged that the claimant was then advised that they were entitled to claim interest on the amount payable to them under the decree of the High Court only up to the date when they withdrew Rs. 4,284-14-5 that is, 5th December, 1955.

The learned Subordinate Judge dismissed E.A. No. 124 of 1956 filed by the claimants on the ground that it was open to them to have withdrawn the entire amount in Court-deposit on furnishing security and that, if they were unable to do so, that would be no ground for allowing interest on the amount due to them. In E.A. No. 75 of 1956, the learned Subordinate Judge directed respondents 1 to 4, that is, the claimants and their sureties, to pay the Government interest at the rate of 6 per cent. per annum on Rs. 20,067-8-2 from 20th September, 1950, the date of deposit of the decree amount in Sub-Court, till date of payment. On failure to deposit this sum, the learned Subordinate Judge directed the security bond, dated 17th June, 1951, executed by the sureties to be assigned in favour of the Government.

The question for consideration in C.M.A. No. 42 of 1957 is whether the Government is entitled to interest on the excess amount deposited by way of restitution; and the question for consideration in C.M.A. No. 41 of 1957 is whether by reason of the deposit made by the Government in pursuance of the order of the High Court, the claimant became disentitled to interest on the amount due to him and lying in Court-deposit.

In C.M.A. No. 42 of 1957, the question for consideration is based upon the principle of restitution contained in section 144, Civil Procedure Code. There is no dispute that this principle applied to the case, since, by reason of the erroneous decree of the Subordinate Judge, the Government was made to deposit a larger sum than the sum ultimately found due to the claimant by the decree of the High Court. The contention of the learned counsel for the claimants in regard to this matter falls under two heads. The first is that the Government would not be entitled to claim interest on any amount not drawn by the claimants from Court-deposit. That is to say, though the total amount of Rs. 40,366-5-0 was deposited by the Government on 20th September, 1950, no portion of this amount was drawn till 7th July, 1951. Therefore, it is argued that the Government will not be entitled to claim interest on any amount from 20th September, 1950, to 7th July, 1951. Secondly, it is contended that, from 7th July, 1951 to 21st October, 1954, the Government would be entitled to claim interest only on the sum of Rs. 10,715-1-7, because, that was the actual excess amount withdrawn by the claimant from Court. There is a slight misconception in this argument, because the Government did not claim any interest on Rs. 15,784-14-5, the amount due to the claimant according to the decree of the High Court. The claim of the Government was confined to the excess over this Rs. 15,784-14-5. Thus, the argument reduces itself to this. The claimant will not be liable to pay interest over the excess, because, even though the amount was deposited by the Government in accordance with the order of this Court in the stay application, the claimant had not withdrawn the amount, or, had not the benefit of that money. In support of this contention, the decisions in *Sitaramayya* v. *Venkanna*[1], *Periakaruppan Chettiar* v. *Veerappa Chettiar*[2] and *Mooka Naicker* v. *Venkataswami Naidu*[3] were relied on. The common principle which was said to have been laid down by all these decisions was that, where a judgment-debtor makes a payment which is in the nature of a voluntary payment of the decree amount, he would not be entitled to claim interest by way of restitution on the excess amount deposited by him. In elaborating this argument, it was said that, at the time when

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1. (1941) 2 M.L.J. 768.
2. (1943) 2 M.L.J. 441 : I.L.R. (1944) Mad. 336.
3. (1950) 2 M.L.J. 194.

the Government applied for stay of execution in the High Court, the claimant had not taken any steps to levy execution for the amount due to him under the decree of the Subordinate Judge. In *Sitaramayya's case*[1], the facts were these. A decree was obtained for a sum of Rs. 2,948-15-8 in the Court of the District Munsiff, Peddapur. The judgment-debtor appealed to the Court of the Subordinate Judge, Cocanada, and, as a result of that appeal, the suit was dismissed with costs. While the appeal was pending in the Court of the Subordinate Judge, the decree-holder applied for execution of the decree which he had obtained, but, as a result of an arrangement, this execution application was dismissed. Thereafter, the judgment-debtor applied for stay of execution, and stay was ordered on condition that the judgment-debtor should furnish security for the amount of the decree. Instead of furnishing security in the form of immoveable property the judgment-debtor deposited the decree amount in cash. On paying the decree amount, the judgment-debtor obtained an order from the Court to the effect that the decree-holder could withdraw it only on furnishing security. When the appeal was allowed, the judgment-debtor withdrew his money from Court and made an application for an order against the decree-holder for payment of interest. The first Court refused this application. But, on appeal, the Subordinate Judge granted interest at the rate of 12 per cent. per annum. On Second Appeal, this decision of the Subordinate Judge was confirmed by Wadsworth, J. A Letters Patent Appeal was taken against this decision, and the Bench held that section 144 did not apply to the facts of the case. They mainly relied on the circumstance that the order of the appellate Court granting stay did not provide for payment into Court. The Bench pointed out further that, if the judgment-debtor had complied with the order of the first appellate Court and furnished security in the form of immoveable property there could be no question of payment of interest. They recognised that the judgment-debtor had suffered loss by the deposit ; but they refused to make this the ground for ordering restitution by way of interest, because, he was not bound by the order of the appellate Court granting stay of execution to deposit the money in cash. This decision is therefore no authority governing the facts of the instant case.

In *Periakaruppan Chettiar* v. *Veerappa Chettiar*[2], a Bench of this Court ruled that interest on the decree amount did not cease to run from the date of payment into Court in pursuance of the order of an appellate Court granting stay of execution. That was a case where the money was paid into Court by the judgment-debtor on his obtaining an order of stay which directed that the money could be taken out by the decree-holder on giving security. No security was given and the money was not drawn. It was held that the decree-holder was not bound to give security, and, if he claimed interest on the decree amount according to the terms of the decree, that claim could not be negatived by pleading as a defence the deposit made in pursuance of the order granting stay. The basis of the decision is that the deposit made was not a deposit in terms of Order 24, rules 1 to 3. The reference to Order 24 in this decision may not be quite appropriate, because, that order relates to payment into Court of money during the pendency of a suit and before a decree is passed. Deposit of money after decree should be governed by Order 21, rule 1. Clauses (*a*) and (*b*) of rule 1 of Order 21 do not govern a case of this kind, as they relate to payment to the decree-holder whether through Court or outside Court in accordance with the decree passed by the Court, whose decree is being executed. The order made in the stay application cannot be equated to the decree of the High Court in the appeal. Even otherwise, *Periakaruppan Chettiar's case*[2] was not a case of restitution, which is the only question with which I am concerned in C.M.A. No. 42 of 1957. How far this decision will affect the disposal of C.M.A. No. 41 of 1957 I would indicate later in this judgment.

In *Mooka Naicker* v. *Venkataswami Naidu*[3], Raghava Rao, J., purported to follow *Periakaruppan Chettiar* v. *Veerappa Chettiar*[2]. That was also not a case dealing with

1. (1941) 2 M.L.J. 768.
2. (1943) 2 M.L.J. 441 : I.L.R. (1944) Mad. 336.
3. (1950) 2 M.L.J. 194.

the question of restitution. It is unnecessary for the purpose of deciding C.M.A. No. 42 of 1957 to consider the question whether the payment made by the Government in this case was a voluntary payment. So long as the decree of the Subordinate Judge stood, the Government was bound to obey it, and the mere fact that no execution had been levied by the claimant for the amount decreed by the Subordinate Judge is no distinguishing circumstance to hold that interest could not be claimed by way of restitution by the judgment-debtor as a consequence of the reversal of the decree of the Subordinate Judge by the decree of this Court. The principle universally applicable to such cases is that the decree of the appellate Court is the decree which the trial Court ought to have passed, and any act done by the judgment-debtor in obedience to the decree of the trial Court, if it results in loss to the judgment-debtor, should be compensated by restitution. It will be putting a premium upon dilatoriness and obstruction to hold that, merely because the judgment-debtor had obeyed the decree of the trial Court by depositing the amount without waiting for execution being levied, he should be in a worse position than he would be if he had paid the amount after execution was levied. The true principle upon which relief by way of restitution may be claimed has been laid down by a Bench of this Court as early as 1932 in *Shanmugasundara Mudaliar* v. *Ratnavelu Mudaliar*[1]. That Bench pointed out that the basis of the rule of restitution is not making the unsuccessful party disgorge any profit he had made out of the decree reversed, but giving compensation to the successful party in the appeal for the loss which he had suffered by obeying the decree of the trial Court. If this principle is kept in mind, it should make no difference whether the excess amount deposited by the Government was a voluntary deposit or an involuntary deposit as a result of execution levied by the decree-holder. It was certainly open to the Government to obey the decree straightway without execution being levied and to take steps to safeguard its interests in case the appeal succeeded. That was the effect of the order of the High Court in directing security to be furnished by the decree-holder before drawing out the entire amount. But then there is one distinction which may become relevant in C.M.A. No. 41 of 1957. The order of the High Court directing security to be furnished for the entire amount may not be relied on by the Government as a protection to deny interest to the decree-holder in so far as it related to the sum of Rs. 15,000 and odd which was ultimately found by the High Court to be the amount due to the decree-holder claimant. But the claim for interest made by the Government in C.M.A. No. 42 of 1957 does not relate to this amount, and, therefore, the Government is entitled to claim interest on the excess amount which was granted by the decree of the Subordinate Judge. C.M.A. No. 42 of 1957 is therefore dismissed with costs.

In C.M.A. No. 41 of 1957, two grounds were urged by the learned Government Pleader for contending that the claimant will not be entitled to interest after the date of deposit. The first is that Order 21, rule 1 (*c*) would apply to the facts of this case and the deposit was made in accordance with the direction of the High Court. That order, so far as it is relevant, reads thus :—

> " All money payable under a decree shall be paid as follows, namely :—
>
> (*a*) into the Court whose duty it is to execute the decree; or
>
> (*b*) out of the Court to the decree-holder ; or
>
> (*c*) otherwise as the Court which made the decree directs."

Clauses (*a*) and (*b*) obviously relate to payment of the decree-amount to the decree-holder either through Court or outside Court. Clause (*c*), in my opinion, refers to a case where the decree directs payment otherwise than in the manner contemplated under clauses (*a*) and (*b*). To construe the order of the High Court in the stay application in the instant case as a direction of the Court which made the decree appears to be almost impossible. Apart from the fact that that order was not made by the Court which made the decree it is not an order directing payment

1. (1933) 63 M.L.J. 383.

of the decree amount as a result of the final order made in the appeal. To such interim orders, obviously, clause (*c*) could not apply.

The next argument of the learned Government Pleader was that the deposit *ipso facto* stopped running of interest on the admitted amount due to the claimant, because, it was the fault of the claimants that they were unable to draw out the amount after complying with the condition imposed by the High Court in its order granting stay. This argument runs counter to the decision in *Periakaruppan Chettiar* v. *Veerappa Chettiar*[1], which is a Bench decision, and, therefore, binding upon me. The reasoning behind the argument, as I construe it, is this. A duty was no doubt cast upon the Government to obey the decree of the Subordinate Judge by paying the entire amount decreed by him. But this direction in the decree of the Subordinate Judge was modified by the order of the High Court in the stay application. So long as the judgment-debtor obeyed the order of the High Court by satisfying the condition as to deposit, no further liability should attach to the Government by way of paying interest decreed by the Subordinate Judge. It is true that this argument would hold good in the cases of the excess amount negatived by the decree of the High Court. But, in respect of the amount decreed by the High Court, namely, Rs. 15,784-14-5 the denial of interest was or could be, only the result of the obtaining of an order by the Government in the stay application as to security for this amount also. This is not a case where the decree-holder would be bound to give security in any event just like a case covered by a decree in favour of a minor or a lunatic provided for under Order 32, Civil Procedure Code. But for the order of the High Court directing security to be given for the entire amount deposited by the Government, the decree-holder would have been in a position to withdraw the sum of Rs. 15,784-14-5 unconditionally from Court. To this extent, the Government is directly responsible for the decree-holder not drawing this amount. It is no answer to say that the decree-holder could have furnished security and drawn this amount, or could have moved the Court to invest the money in interest-earning securities. That was not warranted by the decree of the trial Court. The variation in this regard made by the order of the High Court in the stay application was the outcome of the action of the Government in inviting the appellate Court to pass such an order in respect of the entire amount. Certainly, by such order, the decree-holder should not be put to loss, namely, loss of interest on the amount due to him as ultimately found by the appellate Court. It will be subversive of all settled principles to hold that, by obtaining an order in the stay application, the Government could cause loss to the decree-holder by preventing him from drawing any portion of the amount due to him in respect of which the appeal failed. It is undeniable that the appeal failed in respect of the excess over the sum granted by the Land Acquisition Officer which the High Court granted by its decree. I am, therefore, unable to find any reason to ignore the condition, namely, furnishing security for the entire sum granted as enhancement by the Sub-Court which the decree-holder was entitled to refuse to comply with so far as the sum of Rs. 15,000 odd ultimately decreed to him was concerned. The learned Government Pleader was not able to cite any authority for the contention that the decree-holder will cease to earn interest on the amount of money due to him merely because a deposit of that sum was made under the condition that security should be given for drawing that amount which ultimately he becomes entitled to both under the original decree passed by the trial Court and also under the decree of the appellate Court which modified the trial Court's decree.

C.M.A. No. 41 of 1957 is, therefore, allowed, and the order of the Subordinate Judge dismissing E.A. No. 124 of 1956 is set aside. The appellant in this C.M.A.—the claimant—is entitled to interest on Rs. 15,784-14-5 at 6 per cent. per annum from 20th September, 1950 to 7th July, 1951 and also to interest on Rs. 4,284-15-0 from 21st October, 1954 to 5th December 1955. According to the memorandum filed by the appellant in both these appeals, the total amount of interest due to the

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1. (1943) 2 M.L.J. 441 : I.L.R. (1944) Mad. 336.

appellant for these two periods would come to Rs. 988-74. The Government would be entitled to interest on the excess amount deposited by it—Rs. 20,067-82—from 20th September, 1950 till the date of payment. The claimants and their sureties will be entitled to set-off the interest due under my order in C.M.A. No. 41 of 1957 against the interest payable under the order of the Subordinate Judge in E.A. No. 75 of 1956 and also to set-off Rs. 1,386-50 which has been earned as interest on the amount in deposit being invested in National Savings Certificates.

The Government will pay costs to the appellant in C.M.A. No. 41 of 1957.

R.M. *C.M.A. No.* 41 *of* 1957 *allowed and* 42 *dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

Kamakshi .. *Petitioner**

v.

Sinnachami Naidu .. *Respondent.*

Madras Cultivating Tenants Protection Act (XXV of 1955), *section* 3—*Applicability to cases of trespassers.*

Where there is an express allegation in a petition that the tenant has surrendered possession and later trespassed on the property, the procedure under section 3 of the Madras Cultivating Tenants Protection Act could not apply. On the surrender by the tenant the relationship of landlord and tenant ceases between the parties and thereafter if there is a trespass the aggrieved party has to approach the Civil Court for remedy and not the Revenue Court under section 3 of the aforesaid Act.

Petition under section 115 of Act V of 1908 and section 6-B of Madras Act XXV of 1955 praying the High Court to revise the Order of the Sub-Collector, Dindigul, dated 30th September, 1957 and made in C.T.P.A. No. 57 of 1957.

M. Natesan, for Petitioner.

R. Ramasubba Ayyar, *A. D. Sitaraman* and *B. R. Dolia*, for Respondent.

The Court delivered the following

JUDGMENT.—This is a petition to revise the order of the Sub-Collector of Dindigul in C.T.P.A. No. 57 of 1957, whereby that Court held that the petitioner was in arrears and passed an order under section 3 (4) (*b*) of the Madras Cultivatings Tenants Protection Act evicting him from the lands. The tenant is the petitioner. The respondent, who was the lessee from the owner of the property claimed that he had sub-let the lands to the petitioner orally and that about 13 kalams of paddy were due from him by way of rent. It was stated by the respondent in his petition that the petitioner surrendered possession soon after harvest of the kalam crop. It was then stated as follows. That the owner of the property again leased the property to the respondent and he was in actual possession of the lands having manured the lands and ploughed the same. While so, on 15th July, 1957, the petitioner entered the land unlawfully and wanted to plough. In this the petitioner was prevented by the respondent. It is also stated that the petitioner had denied the title of the respondent as landlord. Under those circusmtances an order for eviction was sought under section 3 of Act XXV of 1955. The lower Court held that the petitioner was in arrears and passed the order as mentioned above.

Mr. Natesan, learned counsel for the petitioner, urged before me that the lower Court was not competent to entertain the petition under section 3 of the Act XXV of 1955. As I stated already, the respondent has made a definite allegation that the petitioner had surrendered possession and that some months afterwards trespassed into the property. On such surrender the relationship of landlord and tenant has ceased between the parties, and therefore, if there was a trespass the respondent would

* C.R.P. No. 1606 of 1957. 2nd April, 1959.
(17th Chaitra, 1881—Saka).

have to approach the civil Court for remedy and not the revenue Court under the provisions of section 3 of Act XXV of 1955. The lower Court would therefore have no jurisdiction to entertain the application for eviction on the ground that after the termination of the tenancy the ex-tenant had trespassed into the property and was squatting on it. The result is this Revsion Petition has got to be allowed, but in the circumstances there will be no order as to costs.

R.M. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBRAHMANYAM.

S. Rengaraja Iyengar and another .. *Appellants**

v.

Achikannu Ammal and another .. *Respondents.*

Madras Land Encroachment Act (III of 1905), section 2—Scope of—House-sites—What are—Whether buildings should be actually built on the site to render a site house-site.

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), section 3 (b)—Applicability of Land Encroachment Act to house-sites in estates.

In order that a land may properly be described as house-site within the meaning of section 2 of the Madras Land Encroachment Act, 1905, it is not necessary that there should be a residential building actually constructed and standing on the site. Lands which are within the limits of the gramanatham and on which buildings or sheds may be put up when necessary should also be house-sites within the meaning of the section whether such buildings are constructed or not.

The provisions of section 3 (*b*) of the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, vests all the lands in the erstwhile estates in the Government and makes certain Acts applicable in ryotwari areas applicable to those lands also. The provisions as to vesting of lands under section 3 (*b*) of the Act shoud be read so as to be in conformance with the provisions regarding the applicability of the enactments relating to ryotwari areas. House-sites in gramanatham, therefore, could not stand vested in the Government under section 3 (*b*) of the Estates Abolition Act.

Appeal against the Decree of the Court of the Subordinate Judge (Additional) of Devakottai, in Appeal Suit No. 1 of 1956, preferred against the Decree of the Court of the District Munsif of Devakottai, in Original Suit No. 134 of 1954.

G. Jagadisa Ayyar, for Appellants.

P. S. Chandrasekhara Ayyar and *P. S. Ramachandra Ayyar*, for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiffs appeal from the judgment of the learned Additional Subordinate Judge, Devakottai, in A.S. No. 1 of 1956 on his file by which he allowed the appeal preferred by the defendants against the judgment and decree of the District Munsif of Devakottai, in O.S. No. 134 of 1954. The suit was for a declaration that the plaintiffs were the owners of the site described in the plaint schedule and for a decree setting aside the order passed by the District Munsif in E.A. No. 92 of 1954, on his file and directing possession of the property to be delivered to the plaintiffs.

The suit property is the northern portion of the property purchased by the plaintiffs under Exhibit A-6 on 14th November, 1951, from one Alagappa Chettiar and three others. A part of this northern portion had been leased by one of the vendors in favour of one Muthayya under Exhibit A-4 on 1st October, 1945. The lease was to enable Muthayya to construct and conduct a tea-shop in the site. He accordingly constructed a tea-shop and was conducting it for some years. The southern portion of the property purchased by the plaintiffs under Exhibit A-6 had been leased to them by Chidambaram Chettiar, father of Alagappa Chettiar, one of the persons who later executed the sale-deed, Exhibit A-6. The site east of the site leased to Muthayya and the plaintiffs was leased to the second defendant by Chidambaram Chettiar under Exhibit A-5 on 25th September, 1949. After Chidambaram Chettiar's death, his sons conveyed to the plaintiffs the site which had been leased to Muthayya

*S.A. No. 84 of 1957.

3rd March, 1959.
(12th Phalguna, 1880-Saka.)

under Exhibit A-4 and the site which had been leased to the plaintiffs themselves east of the site purchased by the plaintiffs under Exhibit A-6 was the site which had been leased to the second defendant under Exhibit A-5. That is the finding of the Courts below, which I accept.

Muthayya purported to sell to his wife under Exhibit A-7 the site which had been leased to him by Alagappa. She purported to sell the site to one Vaidyalingam Pillai under Exhibit A-31 on 17th November, 1951. Against Muthayya, his wife (Sathi) and Vaidyalingam Pillai, the plaintiffs instituted O.S. No. 94 of 1952 on the file of the District Munsif for possession of the property which had been leased to Muthayya and which had been subsequently sold to the plaintifis. They obtained a decree for possession, in that suit. The decree was eventually confirmed in Second Appeal No. 663 of 1954. In execution of the decree, delivery of the property to the plaintiffs was ordered. The defendants in this suit, *viz.*, the parents of Vaidyalingam Pillai, obstructed delivery to the plaintiffs. Vaidyalingam Pillai's father is the second defendant who had obtained a lease of the site east of the site which had been purchased by the plaintiffs under Exhibit A-6. To remove the obstruction, the plaintiffs filed E.A. No. 92 of 1954 in E.P. No. 62 of 1954 in O.S. No. 94 of 1952 on the file of the District Munsif, Devakottai. That application was dismissed. Hence the plaintiffs instituted, under Order 21, rule 103, Civil Procedure Code, the suit which has given rise to this Second Appeal praying for a decree declaring their title, setting aside the order pased in E.A. No. 92 of 1954 and directing delivery of possession to the plaintiffs. The suit was decreed by the learned District Munsif on 11th November, 1955. The decree was set aside in appeal by the learned Subordinate Judge on 3rd September, 1956. He dismissed the plaintiffs' suit with costs.

The learned Subordinate Judge dismissed the plaintiffs' suit on the ground that the plaintiffs' vendors did not have title to convey the property on the date of Exhibit A-6, *viz.*, 14th November, 1951. He found that the plaintiffs and their predecessors-in-title had title on the date on which they granted leases in favour of Muthayya and the plaintiffs in 1948 and 1949. The Subordinate Judge held, however, that because the village in which the land was situate was taken over by the Government under the Madras Estates (Abolition and Conversion into Ryotwari) Act, (Madras Act XXVI of 1948), the title of the plaintiffs' vendors became extinguished and that the plaintiffs acquired no title under the sale-deed.

The suit to which this appeal relates is situate in the shrotriem village of Kurunthampallam. The village was an 'estate'. The Government notified the estate under Madras Act XXVI of 1948 on 1st October, 1951. The learned Subordinate Judge holds that, by reason of that notification, the plaintiffs' vendors lost title to the site. The point for determination in this appeal is whether that finding is correct.

The Subordinate Judge appears to think that the plaintiffs' vendors were the landholders of the estate. He uses the word 'proprietor' throughout his judgment in relation to the vendors. There is no evidence which shows that they were the landholders in relation to the estate. In the sale-deed which they executed in favour of the plaintiffs and in the lease-deed, Exhibit A-5 the vendors or the lessors describe themselves as the owners of both the *warams* in the land. That expression does not necessarily lead to the inference that they were the proprietors or the landholders of the estate in relation to land in an estate, the claim by a person that he owns both the *warams* in some particular lands situate in the estate need signify no more than that, in relation to the lands, he is under no liability to pay any rent, cist or *melwaram* to the proprietor or the landholder or any other person. The expression *iruwaramdar* does not necessarily lead to the inference that such person is the owner, proprietor or landholder of the village in which the land is situate. The finding, in so far as the learned Subordinate Judge's judgment can be said to contain such a finding, that the vendors of the plaintiffs were the landholders or proprietors, is not a finding supported by any evidence and is hereby set aside. We should for the purpose of the appeal proceed on the basis that the plaintiffs' vendors were the owners of the land which they sold and that in respect of that land no cist or *melwaram* or rent was payable to the landholder.

As to the character of the land, the only evidence that is available is the evidence furnished by the description of the property in the sale-deed, Exhibit A-6, and the lease-deeds or rent-deeds, Exhibits A-4 and A-5. These documents show that the site which the plaintiffs purchased under Exhibit A-6 had been leased in two parcels ; the northern parcel in favour of Muthayya Ambalam in order that he might construct and conduct a tea-shop in that part of the land, and the southern parcel in favour of the plaintiffs in order that they might construct and conduct a rice mill. The documents show also that the property leased to the second defendant, east of the site which was subsequently purchased by the plaintiffs was leased in 1949 to enable him to construct a building for use as a school. There is no evidence that any part of these lands was at any time under cultivation or was in use otherwise than as house-site. There is no evidence that any rent or cist or *melwaram* was paid for any part of these lands at any time. Therefore, on the evidence, the finding to be recorded in relation to the lands purchased by the plaintiffs and leased to the second defendant is that they are house-sites in the village of Kurunthampallam village.

Section 3 (*b*) of Madras Act XXVI of 1948 enacts :

> " With effect on and from the notified date and save as otherwise expressly provided in this Act the entire estate (including all communal lands and porambokes) other non-ryoti lands. . . . . shall stand transferred to the Government and vest in them, free of all encumbrances ; and the Madras Revenue Recovery Act, 1864, the Madras Irrigation Cess Act, 1865, and all other enactments applicable to ryotwari areas shall apply to the estate."

The Madras Land Encroachment Act, 1905 (Madras Act III of 1905) is one of the enactments which are applicable to ryotwari areas and which become applicable to an estate when it is notified under section 3.

The learned Subordinate Judge held that under section 3 (*b*) the land to which this appeal relates became transferred to the Government and that the title of the plaintiffs' vendors got extinguished. I do not consider that the view can be supported. A house-site owned by a person in what is generally known as *gramanatham* is not, under Madras Act III of 1905, property of the Government. Section 2 of Madras Act III 1905 says, in regard to lands which are not covered by clauses (*a*) to (*e*) of sub-section (1) of section 2, that those lands are and are hereby declared to be the property of the Government, save in so far as they are temple-site or owned as house-site or back-yard. In order that a land may properly be described as house-site within the meaning of that expression in section 2 of Madras Act III of 1905, it is not necessary that there should be a residential building actually constructed and standing on that site. A person may in a village habitation own a house in a street and a site on the outskirts of the habitation but within the limits of the *gramanatham*, which he uses for the purpose of storing his hay and manure, if he is an agriculturist, or as a smithy, if he is a smith, or as a brick-kiln if he is a brick-maker or as a place for weaving if he is a weaver. On such sites, buildings or sheds may when necessary be constructed. But whether such buildings or sheds are constructed or not, such sites are, in my opinion, house-sites within the meaning of that expression in section 2 of the Madras Act III of 1905. Madras Act III of 1905 is made applicable to an estate when it is notified under Madras Act XXVI of 1948. The provision as to vesting under section 3 (*b*) of Madras Act XXVI of 1948 should be read so as to be in consonance with the provisions regarding the applicability of the enactments relating to ryotwari areas which are expressly made applicable to estates notified under the Act.

It is contended, that, in relation to buildings, specific provision is made under section 18 of Act XXVI of 1948 and that, consequently, unless a house-site can be brought within the ambit of section 18, such house-site should be held to be property as to which title gets transferred to the Government under section 3 (*b*). Section 18 deals, in my opinion, with buildings wherever they may be situate, whether in the *gramanathams*, or in ryoti lands or *pannai* lands or waste lands. Section 18 has no particular application to buildings or house-sites in a *gramanatham*. A building in a *gramanatham* (or village habitation) is protected from transfer of title to the Government both under section 18 (1) of Madras Act XXVI of 1948 and under the Madras

Land Encroachment Act (III of 1905). The title to a house site in a *gramanatham* is protected from transfer to Government by the operation of Madras Act III of 1905.

It is not necessary that, in order that the policy underlying Madras Act XXVI of 1948 be completely given effect to, house-sites belonging to private individuals (that is, persons other than the landholder) in a *gramanatham*, should be transferred to the Government. It is not part of the policy of the Act to transfer to the Government land in which the proprietor had no interest at any time. Further, transfer of title of such house-sites to the Government would be virtually without payment of compensation because there would be no means of determining the part of the total compensation payable for the estate as a whole, which should be regarded as compensation paid for a few cents of house-site in a hamlet of the village. Therefore, if there is any ambiguity in the Act in relation to transfer of title as to a house site, such ambiguity should be resolved in favour of the owner, because no legislation should be held to be expropriatory in character if such an inference could possibly be avoided.

I hold that section 3 (*b*) of Madras Act XXVI of 1948 does not have the effect of transferring to the Government title to a house-site within a *gramanatham* belonging to a person other than the landholder when the estate in which the house-site is situate is taken over under a notification issued under the Act.

The title of the plaintiffs' vendors was not extinguished by the notification. The plaintiffs acquired title to the site under the sale-deed Exhibit A-6. The learned Subordinate Judge's finding on the question of title is hereby set aside. In the place of the judgment and decree of the learned Subordinate Judge, there will be a decree restoring the learned District Munsif's decree with costs in all Courts.

Leave to appeal granted.

R.M. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P.V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE GANAPATHIA PILLAI.

The Buckingham and Carnatic Company, Ltd., Madras .. *Appellant**

v.

The B. & C. Mills' Staff Union, by Secretary and another .. *Respondents.*

Industrial Disputes Act (XIV of 1947), *section* 2 (*k*)—*Industrial dispute—Collective disputes by majority of workers—What amounts to—Several units of an establishment—If should be treated as one.*

Though the definition of the term ' industrial dispute ' in section 2 (*k*) of the Industrial Disputes Act is very wide it is now well-established that only collective disputes and not a mere individual dispute that will fall within the scope of the Act. But even an individual dispute can become an industrial dispute if it is taken up by a union of workers or a number of workmen. In an establishment which employs a large number of workmen having defined work and falling into several groups it is possible that an industrial dispute could arise between the management and a particular group of workmen. It cannot be said in such cases that a majority of the total number of employees in the entire establishment should take up the cause. In establishments which employ several well-defined sections of workmen and has several units, it cannot be said that the entire establishment should be treated as one unit to decide whether the dispute raised by the workmen in one unit has the backing of a majority or not.

Appeals under clause 15 of Letters Patent against the Order of Mr. Justice Balakrishna Ayyar, dated 20th March, 1959 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petitions Nos. 54 and 55 of 1959, presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records relating to the Order, dated 31st January, 1959, in I.D.No. 69 of 1958 on the file of the Industrial Tribunal, Madras, and for the issue of a writ of prohibition directing the second respondent to forbear from proceeding with the hearing in I.D. No. 69 of 1958.

*Writ Appeal Nos. 49 and 50 of 1959. 11th September, 1959.

K. Rajah Ayyar for *M/s. King and Partridge*, for Appellant.

S. Mohan Kumaramangalam and *K. V. Sankaran*, for Respondents.

The Judgment of the Court was delivered by

Rajamannar, C.J.—These two appeals are from the judgment of Balakrishna Ayyar, J., disposing of two writ petitions, namely W.P. Nos. 54 and 55 of 1959. They both relate to an order of the Industrial Tribunal, Madras, dated 31st January, 1959, in Industrial Dispute No. 59 of 1958 on the file of the Tribunal. The management of the Buckingham and Carnatic Company, Limited, filed both the petitions. In W.P. No. 54 of 1959 they prayed for the issue of a writ of *certiorari* to quash the said order of the Industrial Tribunal while in W.P. No. 55 of 1959 they prayed for a writ of prohibition directing the Industrial Tribunal to forbear from proceeding with the hearing in Industrial Dispute No. 69 of 1958 in pursuance of the said order. Both the petitions were dismissed by the learned Judge and these appeals are by the Buckingham and Carnatic Company, Limited.

A question of far-reaching importance arises in these appeals on which there appears to be no direct authority. The question is this : If in an industrial establishment which employs several workmen who fall into more or less well-defined sections having regard to the nature of the work in which they are employed a dispute is raised by a few of the workmen in one of such sections and that dispute is taken up by a substantial number of persons employed in that section, whether organised as a union or not, can it be said that there is an industrial dispute within the meaning of that term as defined in the Industrial Disputes Act, or is it only when a majority or a substantial number of workmen employed in all the sections of the establishment take up that dispute or espouse their cause that an industrial dispute can be said to arise. The question is likely to arise in large establishments like the appellants in which thousands of workmen are employed. So far as we are aware, there is no provision of law which prohibits the existence of more than one union or association of employees in a particular industrial establishment. There is nothing to prohibit each section of the establsihment having a union the membership of which is confined to the employees in that section. Even if all the employees in an establishment are employed in the same kind of work, there may be two different unions with separate membership. There may also be several industrial establishments the employees in which are not members of any union at all. In this country as yet there is no organised system of recognised collective bargaining units in respect of each industrial establishment or sections thereof.

On 1st December, 1958, the Government of Madras made an order in exercise of the powers conferred by section 10 (1) (*d*) of the Industrial Disputes Act, 1947, referring for adjudication to the Industrial Tribunal, Madras, a dispute between the workmen and the management of the Buckingham and Carnatic Mills which had been raised by the Buckingham and Carnatic Mills Staff Union, namely, "Fixation of scales of pay for Comptists and Machine Operators." By a subsequent order made on 4th February, 1959, the Government amendment the reference by describing the dispute thus :

"Fixation of scales of pay for the Comptists and Machine Operators and fitment of existing Comptists and Machine Operators in the scales of pay, if any fixed."

It may be mentioned, however, that this amendment was made after the order of the Industrial Tribunal which is the subject-matter of the writ petitions. Two main preliminary objections were taken by the management, namely

(1) that there was no industrial dispute within the meaning of the Act because the dispute had not been taken up by a Trade Union of which the workmen to whom the dispute relates are members and there was no concerted demand for redress by the majority of workmen in the undertaking.

(2) the award made by the Industrial Tribunal on 19th January, 1957, was binding on all the workmen of the establishment including the Comptists and Machine Operators, as the award remains in force for a period of three years from the date of the award and during that period no industrial dispute could be raised with regard to the scales of pay of any of the workmen. Both the preliminary

objections were overruled by the Industrial Tribunal by his order, dated 31st January, 1959. Balakrishna Ayyar, J., confirmed that order. Hence these appeals.

Mr. Rajah Ayyar, learned counsel for the management of the establishment, practically confined his argument to the first of the objections. To deal with this contention, it is necessary to state a few facts. The Comptists and Machine Operators belong to the clerical staff of the establishment. They operate machines which are used for the purpose of quick and ready reckoning and preparation of statistics. The total number of workmen employed in the establishment is about 14,700. It is stated that about 10,000 of these workmen are members of the Madras Labour Union. Some of them are members of the clerical staff. Of the 700 employees in the clerical section of the establishment 434 of them are members of the Buckingham and Carnatic Mills Staff Union. It is this union which has espoused the cause of the Comptists and Machine Operators who are 47 in number. The question is whether the dispute raised by these 47 employees which has been espoused by the Buckingham and Carnatic Mills Staff Union which has a membership of 434 out of 700 of the clerical staff is an industrial dispute;

"Industrial dispute" is defined thus in section 2 (*k*):

"'Industrial dispute' means any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person."

Though the definition is in very wide terms and may include a dispute between the management of an industrial establishment and three or four workmen employed in it, it is now well-established that a mere individual dispute will not fall within the scope of the definition and that what is contemplated is a collective dispute.

In an early case in this Court, *Kandan Textiles* v. *Industrial Tribunal*[1], which was decided by a Division Bench of which one of us was a party, it was definitely held that there could be no collective dispute unless at least a substantial number of the employees in the establishment as a whole or in the concerned part of the establishment should be at dispute. It was also pointed out that it was not necessary that before the Government could make a valid order referreing a dispute to the Tribunal the majority of the workmen should be ranged as one of the parties. A collective dispute is thus described:

"A dispute between the employer on the one hand and the entire establishment or a part of the establishment on the other hand in which case it is reasonable to presume that at least a substantial number of the employees in the establishment as a whole or in the concerned part of the establishment should be at dispute."

In *Manager, U. C. Bank* v. *Labour Commissioner*[2], Viswanatha Sastri, J., agreed with this view of an industrial dispute and said

"The distinction between an individual dispute and an industrial dispute is if I may respectfully say so, well brought out in the judgment of my Lord in *Kandan Textiles Co., Ltd.* v. *Industrial Tribunal Madras*[1], citing *inter alia* a passage from the judgment of Isaacs, J., in *George Hudson, Ltd.* v. *Australian Timber Workers' Union*[3], if the resuming workmen or a substantial body of them or a union of workmen takes up the cause of the victimised employee and demands his reinstatement, there is an industrial dispute.

In *S. R. V. Service, Ltd.* v. *State of Madras*[4], this view was again followed by Rajagopalan, J. A different view was, however, taken, though not by this Court. The point was considered in detail by Venkatarama Ayyar, J., in *C. P. T. Service* v. *Raghunath*[5]. His Lordship referred to the three different views taken by the High Courts and Industrial Tribunals in the country, namely—(1) a dispute which concerns only the rights of individual workers cannot be held to be an industrial dispute, (2) a dispute between an employer and a single employee can be an industrial dispute and (3) a dispute between an employee and a single employee cannot *per se*, be an industrial dispute but it may become one if it is taken up by the Union or a number of workmen. Venkatarama Ayyar, J., was of the opinion that there was considerable

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1. (1949) 2 M.L.J. 789 : A.I.R. 1951 Mad. 616.
2. (1951) 1 M.L.J. 213 : I.L.R. (1952) Mad. 43 : A.I.R. 1951 Mad. 141.
3. (1922-23) 32 C.L.R. 413, 441.
4. A.I.R. 1956 Mad. 115.
5. (1957) S.C.J. 58 : A.I.R. 1957 S.C. 104.

reason behind the third of the views and the preponderencc of judicial opinion was clearly in favour of it. He observed :

" Notwithstanding that the language of section 2 (*k*) is wide enough to cover a dispute between an employer and a single employee, the scheme of the Industrial Disputes Act does appear to contemplate that the machinery provided therein should be set in motion, to settle only disputes which involve the rights of workmen as a class and that a dispute touching the individual rights of a workman was not intended to be the subject of an adjudication under the Act, when the same had not been taken up by the Union or a number of workmen ".

In another case, namely, *Newspapers, Ltd.* v. *State Industrial Tribunal*[1], the Supreme Court expressly approved the view taken by this Court in *Kandan Textiles* v. *Industrial Tribunal*[2], and other cases following it.

Mr. Rajah Ayyar strongly relied on observations in a Patna case, *New India Assurance Co.* v. *Central Government*[3]. In that case it was found that the cause of the dismissed employee had not been taken up by the association of the employees and it was held that therefore there was no industrial dispute which could be referred by the Government. So far this case falls in line with the other cases of this Court to which we have referred. Mr. Rajah Ayyar relied upon the following observations of Ramaswami, J., as he then was :

" In the context of these important provisions of the Industrial Disputes Act it is clear that the ' industrial dispute ' referred to and defined in section 2 (*k*) must be construed to mean not a dispute between an individual workman and the management but a dispute which though it may originate in an action with regard to an individual workman, has developed into a dispute in which the majority of the workmen in the establishment are interested.'?

No doubt the expression used by the learned Judge is ' majority of the workmen in the establishment.' But it is obvious the learned Judge did not mean that there should be an arithmetical majority as in an election, or that a vote should be taken of all the workmen in the establishment for the purpose. This is clear from the fact that the learned Judge cites the decision of this Court in *Kandan Textiles* v. *Industrial Tribunal*[2], as supporting his view. Mr. Rajah Ayyar contended that this statement of the law was approved by the Supreme Court in *Newspapers, Ltd.* v. *State Industrial Tribunal*[1]. We agree with him that the decision was approved by the Supreme Court but we cannot agree with him that the particular observations relied on by him were expressly or impliedly approved. The case is referred to only in the following passage in the judgment of the Supreme Court :

" Another case in which this view was held is *New India Assurance Co., Ltd.* v. *Central Government Industrial Tribunal, Dhanbad*[4]. There the Government referred the question of dismissal of an employee of an Assurance Company and it was not proved that his case was taken up by the employee association. The same view was adopted in *Standard Vacuum Oil Company* v. *Industrial Tribunal.*[5]"

What ' this view ' is can be understood by reference to an earlier passage in the judgment where the three views discussed in *C. P. T. Service* v. *Raghunath*[6], are set out. ' This view ' is that a dispute between employer and a single workman may become an industrial dispute if it is taken up by a Trade Union or a number of workmen. The Supreme Court has in no decision held that there cannot be an industrial dispute unless the cause of an aggrieved workman or a group of workmen is taken up by the majority of the workmen employed in the establishment.

Mr. Rajah Ayyar was unable to cite any decision in which it has been expressly held that to decide whether there is an industrial dispute or not within the meaning of the definition the establishment should be taken as one unit, though there may be several well-defined sections of workmen employed in the establishment, and that in ascertaining whether the cause of a particular aggrieved workman has been taken up by a Union or a substantial number of workmen only one Union should be taken into account and the total number of workmen employed in all the sections should be taken as a single individual unit. If that position is applied to the industrial establishment in question, it would mean that there can be no industrial dispute unless the cause of a particular workman or a number of workmen is taken up by

1. (1957) S.C.J. 566 : 1957 M.L.J. (Cr.) 540 : A.I.R. 1957 S.C. 532.
2. (1949) 2 M.L.J. 789 : A.I.R. 1951 Mad. 616.
3. A.I.R. 1953 Pat. 321.
4. (1953) I.L.R. 32 Pat. 181.
5. I.L.R. (1952) Trav. Co. 432.
6. (1957) S.C.J. 58 : A.I.R. 1957 S.C. 104.

a substantial number of the entire body of workmen employed in the establishment. There is a Union called the Madras Labour Union in which a large number of employees of the establishment are members. According to Mr. Rajah Ayyar, this is the only Union which could take up the cause of any workman in the establishment. In the first place there is no provision of which we are aware which precludes there being more than one Union of workmen employed in an establishment. There is nothing to prevent each section of workmen having a Union or Association of their own, to safeguard the interests of the workmen employed in that section. Section 2 (*s*) of the Industrial Disputes Act contemplates workmen being employed to do manual, supervisory, technical or clerical work. The interests and grievances of persons employed to do clerical work may not concern workmen employed in the technical work in the establishment. There may be peculiar demands from workmen employed in the different sections of an establishment. Suppose there is a large industrial establishment carrying on the business of mining, there may be a large clerical section employed in the office of the establishment in a city, whereas there may be hundreds of workmen employed at the mines which may be even several miles away from the office of the establishment. It seems most unreasonable to say that the grievances of persons employed in the mining section cannot give rise to an industrial dispute unless the majority of the employees in all the sections of the establishment takes up their grievances. Mr. Rajah Ayyar referred to certain provisions of the Industrial Disputes Act as impliedly supporting his view that the establishment must be considered as a single unit. On the other hand a reference to several provisions rather suggests that the Act does contemplate there being several sections in an industrial establishment. Section 2 (*n*) defines public utility service as including ' any section of an industrial establishment, on the working of which the safety of the establishment or the workmen employed therein depends.' Section 18 (*d*) declares *inter alia* that a settlement arrived at in the course of conciliation proceedings under the Act or an award of a Labour Court, Tribunal or National Tribunal which has become enforceable shall be binding on all parties to the industrial dispute, and where a party referred to is composed of workmen, all persons who were employed in the establishment or part of the establishment, as the case may be, to which the dispute relates on the date of the dispute and all persons who subsequently become employed in the establishment or part.

A reference to the Madras Industrial Disputes Rules, 1958, made by the Government in exercise of the powers conferred by section 38 of the Industrial Disputes Act, 1947, is very instructive. Rule 4 lays down that the employer shall fix the number of members constituting the works committee so as to afford representation to the various categories, groups or classes of workmen engaged in, and to the sections, shops or departments of, the establishment. In the election of representatives of the workmen it is contemplated that there may be division of workmen into different electoral constituencies so as to afford representation to various categories, groups and classes of workmen. Rule 7 enjoins on the employer the duty to consult the registered Trade Union or *Unions*, if any, in which the workmen of the establishment are members.

We are in entire agreement with the reasoning and conclusion of Balakrishna Ayyar, J., namely, that as the Act stands, it is impossible to insist that before a dispute between a management and the employees can be called an industrial dispute, that dispute must have the backing of the majority of the total number of employees under that management.

Mr. Rajah Ayyar did not seriously press on us the second objection, namely, the existence of the prior award of Sri Ramaswami Goundar. The Industrial Tribunal has expressly held that the award could be binding so far as the scales of pay are concerned and all that he proposed to do on the reference was to fix the aggrieved employees in the proper grades.

The appeals fail and are dismissed with costs in one appeal. Advocate's fee Rs. 200.

R.M. *Appeals dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM, MR. JUSTICE BASHEER AHMED SAYEED AND MR. JUSTICE RAMASWAMI.

Employees' State Insurance Corporation, Mylapore .. *Petitioner**

v.

M. Haji Md. Ismail Sahib, Proprietor, Messrs. Haji Md. Ismail Sahib Tannery, Tiruvotriyur and others .. *Respondents.*

Criminal Procedure Code (V of 1898), *sections* 346 (1) *and* 526 (1)—*Power of High Court to direct trial of cases before Criminal Court not having territorial jurisdiction in respect of particular cases.*

Employees' State Insurance Act (XXXIV of 1948), *sections* 39 *and* 40—*Contribution by employees—Failure to pay—Offence if committed within the local limits where the Corporation Office is situated—Office of employee outside such local limits—Effect.*

The High Court may, in the circumstances contemplated in clauses (*a*) to (*e*) of section 526 (1) of the Criminal Procedure Code, clothe with jurisdiction any Court, not empowered under sections 177 to 184 of the Code to enquire into any offences and try the same provided that in other respects that Court is competent to inquire into and try such offences.

Ganapathi Chetti v. *Rex,* (1919) 37 M.L.J. 60 : I.L.R. 42 Mad. 791, followed.

Assistant Sessions Judge, North Arcot v. *Ramammal,* (1911) 22 M.L.J. 141 : I.L.R. 36 Mad. 387, held not good law.

The section empowers the High Court to confer jurisdiction upon a Court not having local or territorial jurisdiction, to try an offence, if it is otherwise competent to try such offences.

Section 346 (1) of the Code is wide enough to include cases of want of territorial or local jurisdiction in the Magistrate concerned.

District Magistrate v. *Abdul Kareem,* (1943) 1 M.L.J. 467 : A.I.R. 1943 Mad. 526, differed.

Apart from the general law that it is the duty of the debtor to seek his creditor and pay the dues, under the scheme of the Employees' State Insurance Act, 1948, it is the duty of the employer to make the contribution due by him at the office of the State Insurance Corporation. A breach of the duty imposed by the Statute would constitute an offence triable by a Court within the local limits of whose jurisdiction the office of the Corporation is situate.

Per *Basheer Ahmed Sayeed, J.*—" A patent distinction exists between the powers exercisable by the High Court under section 24 of the Code of Civil Procedure and the powers exercisable under section 526 (1) of the Code of Criminal Procedure in regard to cases of want of territorial jurisdiction. A reading of section 526 (1) of the Code of Criminal Procedure discloses that the powers of the High Court under it are far wider than that contemplated under section 24 of the Civil Procedure Code. Section 526 (1) (*e*) (i) of the Code specifically vests the High Court with powers to order that any offence may be inquired into or tried by any Court not empowered under sections 177 to 184 of the Code, but in other respects competent to inquire into and try such offences, whenever it is made to appear to the High Court that such order is expedient for the ends of justice or is required by any provisions of the Code or will tend to the general convenience of the parties or witnesses."

Petitions praying that in the circumstances stated therein and in the affidavits filed herein the High Court will be pleased to direct the Chief Presidency Magistrate, Egmore, to try C.C.S. Nos. 2396, 3345, 3346, 2397, 3547 and 3548 of 1958 himself, or to transfer the said cases to the file of the Court of the Sub-Divisional Magistrate, Poonamallee.

The Public Prosecutor (*P. S. Kailasam*), for Petitioners.

T. R. Thygarajan, for the Respondent (Accused) in Crl. M.P. Nos. 821 and 827 of 1958.

P. S. Chinnappa, for the Respondents (Accused) in Crl. M. P. No. 823 of 1958.

A. Jagannatha Rao, for the Respondent in Crl. M.P. No. 825 of 1958 and

A. Nagarajan and *A. Viswanathan,* for Respondent in Crl. M.P. Nos. 829 and 831 of 1958.

* Crl. M. P. Nos. 821, 823, 825, 827, 829 and 831 of 1956. 19th August, 1959.

The following order of reference was made by

Somasundaram, J.†—These petitions have been filed either to direct the Chief Presidency Magistrate to try the various Calendar Cases pending before him or to transfer them to the file of the Sub-Divisional Magistrate, Poonamallee. In these cases after the issue of summons to the accused a preliminary objection was taken by the accused to the trial of the cases by the Chief Presidency Magistrate on the ground that the Chief Presidency Magistrate has no territorial jurisdiction to try the cases. In the affidavit filed in support of these petitions on behalf of the complainant in paragraph 4 it is stated thus :

> "An objection was raised by the accused in C.C. No. 3546 of 1958 that the Presidency Magistrate's Court has no jurisdiction and the place where the factory is situated is within the jurisdiction of the Sub-Divisional Magistrate, Poonamallee. In verifying the records at the Collector's Office I find that this factory in which the offence was committed is also situated within the jurisdiction of the Sub-Divisional Magistrate, Poonamallee."

In paragraph 5 it is stated that every offence will have to be enquired into and tried by the Court within the local limits of whose jurisdiction the offence is committed. In paragraph 6 it is stated that it has become necessary that the mistake in filing the complaint before the Chief Presidency Magistrate should be condoned and the case be directed to be heard by the Chief Presidency Magistrate himself or the case may be transferred to the file of the Sub-Divisional Magistrate, Poonamallee. It is clear from the averments made in the affidavit that the objection of the accused to the Chief Presidency Magistrate trying the case is with regard to his territorial jurisdiction. This objection is well founded. It is only the Sub-Divisional Magistrate, Poonamallee, who has territorial jurisdiction to try these cases. In view of the objection raised by the accused the complainant prays that these cases may better be tried by the Chief Presidency Magistrate or they may be transferred from the file of the Chief Presidency Magistrate to the file of the Sub-Divisional Magistrate, Poonamallee. These petitions are resisted by the accused.

I may at once dispose of the prayer to direct the Chief Presidency Magistrate to try the cases. This Court has no power to direct any Magistrate to enquire into a case who has no territorial jurisdiction to try the case unless it be by means of transfer of the case. If at the time of the institution of the proceedings a Court has no territorial jurisdiction to try those proceedings then the High Court would have no power to invest that Court with jurisdiction to try the proceedings. In short, the High Court cannot invest a Court with territorial jurisdiction which it does not possess. That prayer cannot, therefore, be granted.

The only other prayer to be considered is with regard to the transfer of the cases from the file of the Chief Presidency Magistrate to the file of the Sub-Divisional Magistrate, Poonamallee. It is contended on behalf of the respondents (accused) that such transfer cannot be effected. In support of their contention reliance is placed on the decisions in *Assistant Sessions Judge, North Arcot* v. *Ramammal*[1], In re *Sikka Goundan*[2], which is followed in *Suddamma* v. *Emperor*[3], and also on certain observations contained in *Rangammannar Chetti* v. *Emperor*[4]. The above decisions fully support the stand taken by the defence. But it seems to me that the decision in *Assistant Sessions Judge, North Arcot* v. *Ramammal*[1], which is the basis of all the subsequent decisions and which is a Bench decision requires reconsideration. In the above case the question that arose for determination was whether the case committed to the Court of Session, North Arcot Division can be heard by the Sessions Judge of that division when the offence committed by the accused was in a place within the jurisdiction of the Sessions Judge, Salem. There is no doubt that the Magistrate who committed the accused to the sessions had no jurisdiction to enquire into the case. (When I say jurisdiction I mean territorial jurisdiction and not the power of the Magistrate to try the case which is not in dispute). It has been held that in such a case

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† 29th April, 1959.

1. (1911) 22 M.L.J. 141 : 36 Mad. 387.
2. (1922) 17 L.W. 69.
3. (1939) 1 M.L.J. 899 : 1939 M.W.N. 517.
4. 1935 M.W.N. 649.

the order of committal cannot be quashed merely on the ground that the case was enquired into by a Magistrate who had no territorial jurisdiction to try the case because section 531 of the Criminal Procedure Code will apply unless it appears that such an error has occasioned failure of justice. Commitment cannot therefore be quashed ; but objection was taken before the trial in the Sessions Court that the accused were committed to a wrong Sessions Court. The question was whether a wrong Sessions Court could try the accused though the commitment cannot be quashed. In *Queen Empress* v. *Thaku*[1], it was held that an order of commitment by a Magistrate is an order of a criminal Court within the meaning of section 531 of the Code of Criminal Procedure and that such an order directing commitment to a Court of Sessions which has no territorial jurisdiction cannot be set aside unless failure of justice has been occasioned. It was further held that as under section 177 of the Criminial Procedure Code the offence ought to be tried within the sessions division in which it is said to have been committed the Court will transfer the case to the Sessions Court at Ahmednagar unless the Sessions Judge at Ahmednagar reports that this course will be attended with public inconvenience or is likely to defeat the ends of justice. The Sessions Judge of Nasik having reported that no inconvenience or failure of justice will be caused by the transfer of the case to Ahmednager the Court directed the case to be transferred for trial by the Sessions Judge at Ahmednagar. In short, notwithstanding the fact that the Sessions Court at Nasik had no jurisdiction to try the case, the case was transferred to the file of the Sessions Judge, Ahmednagar, who had jurisdiction to try the case. The decision in *Assistant Sessions Judge, North Arcot* v. *Ramammal*[2], refers to this case and the learned Judge observes :

> " The learned Judges in that case having to deal with a commitment made to a Court not having jurisdiction did not quash the commitment but directed the transfer of the case to the Court having jurisdiction. But the Privy Council has pointed out in *Ledgard* v. *Bull*[3], that a transfer from a Court having no jurisdiction would not render the proceedings legal. The Allahabad High Court in *Queen Empress* v. *Ram Dei*[4] followed a similar course but *Ledgard* v. *Bull*[3] was not apparently brought to its notice. We do not, therefore, think that we could be justified in upholding the commitment and directing the transfer of the case to the Sessions Court of Salem. We must hold that the commitment is illegal and set aside the order of the Sub-Magistrate of Tirupattur."

But the learned Judges did not pass any consequential order except setting aside the order of the Sub-Magistrate because an appeal against the judgment of the District Munsif in a connected suit was pending. It is quite clear that the decision in *Assistant Sessions Judge, North Arcot* v. *Ramammal*[2], proceeds on the footing that if the proceedings in a particular Court are void then those proceedings cannot be transferred to any other Court having jurisdiction to entertain the proceedings. In coming to that view reliance was placed on the ruling of the Privy Council in *Ledgard* v. *Bull*[3]. In the Privy Council decision the facts relevant for the purpose of the case are set out at page 202 :

Their Lordships state as follows :—

> " The circumstances in which the plea was taken are these : The plaint was originally filed in the Court of the Subordinate Judge at Cawnpore on the 2nd February, 1882. Whereas section 22 of Act XV of 1859 provides that no action for infringement shall be maintained in any Court other than the principal Court of original jurisdiction in civil cases within the local limits of whose jurisdiction the cause of action shall accrue or the defendant shall reside as a fixed inhabitant. The principal Court of original jurisdiction was the Court of the District Judge. On the 15th February, 1882, the defendant personally signed along with the plaintiff and his pleader a petition praying the District Judge to withdraw the case from the Court of the Subordinate Judge and to try the suit in his own Court. On the same day an order was made in the District Court in these terms.
>
> That the case be transferred from the Subordinate Judge's Court to file of this Court and the date will be fixed hereafter. It is admitted that the District Judge had no authority to issue that order, unless such authority was given him by Act X of 1877, section 25. The suit was entered in the file of the District Court, and has since proceeded as a transferred suit, originally instituted in the Court of the Subordinate Judge."

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1. (1884) I.L.R. 8 Bom. 312.
2. (1911) 22 M.L.J. 141 : I.L.R. 36 Mad. 387.
3. (1886) L.R. 13 I.A. 134 : I.L.R. 9 All. 191 (P.C.).
4. (1896) I.L.R. 18 All. 350.

The defendant objected that notwithstanding to his agreeing to the transfer of the case to the file of the District Court, in view of the fact that the proceedings were not instituted in the Court of competent jurisdiction, the transfer would be void. Their Lordships in dealing with this contention stated as follows, at page 203 :

" The defendant pleads that there was no jurisdiction in respect that the suit was instituted before a Court incompetent to entertain it, and that the order of transference was also incompetently made. The District Judge was perfectly competent to entertain and try the suit if it were competently brought and their Lordships do not doubt that in such a case, a defendant may be barred, by his own conduct from objecting to irregularities in the institution of the suit, when the Judge has no inherent jurisdiction over the subject-matter of a suit the parties cannot by their mutual consent convert it into a proper judicial process although they may constitute the Judge their arbiter and be bound by his decision on the merits when these are submitted to him. But there are numerous authorities which establish that when, in a case which the Judge is competent to try the parties without objection join issue and go to a trial upon the merits, the defendant cannot subseqently dispute his jurisdiction upon the grounds that there were irregularities in the initial procedure which if objected to at the time, would have led to the dismissal of the suit. The present case does not come strictly within these authorities because the defendant's plea was stated before issue was joined on the merits, and in reliance on that plea he objected to the case being tried and withheld his objections to the validity of the patent."

Finally their Lordships held that they were unable to hold that such a consent to a transfer operated as a waiver of the defendant's preliminary pleas and they were consequently of opinion that the District Judge instead of repelling ought to have sustained the defendant's plea. In the result, they humbly advised Her Majesty that the suit must be dismissed on the ground that the suit was not competently brought. In short, they held that the transfer of the suit from the Subordinate Judge's Court to the District Court which had jurisdiction to try was not a valid transfer and that it could not be held to have been properly instituted before the District Court. In coming to this conclusion their Lordships referred to the decision in *Peary Lall* v. *Komal Kishore Dassia*[1], and stated that the superior Court cannot make an order of transfer of a case under section 25 of the Civil Procedure Code (present section 22) unless the Court from which the transfer is sought to be made has jurisdiction to try it. Having regard to the terms of section 25 (22) their Lord ships entirely approve of that decision. In *Peary Lall* v. *Komal Kishore*[1], the suit was tried by the Subordinate Judge of Rungpore. Before the appeal was made the land which formed the subject-matter of the suit was transferred to some other district. The appeal, however, was inadvertently filed in the District Court of Rungpore which owing to the transfer of the subject-matter of the suit had no jurisdiction to hear the appeal. The Calcutta High Court held that the Court to whose jurisdiction the subject-matter of the appeal has been transferred alone is competent to hear the appeal and that the appeal which was filed in the original District Court was invalid and they added :

" We can under section 25 of the Code of Civil Procedure direct the transfer of an appeal only from a Court having jurisdiction to receive and try it. We have no power to authorise any Court to assume jurisdiction to receive and hear any appeal contrary to the usual course prescribed by the Code. We, therefore, leave the appellant to take the necessary steps to place his appeal in the Pubna Court and he can then renew his application to us which is otherwise unobjectionable."

They did not discuss the point as to why if an appeal was filed in a wrong Court it should not be transferred to the appropriate Court having jurisdiction. The judgment contains no discussion of any principle but their Lordships of the Privy Council have approved of this decision and have come to the same conclusion that the proceedings which are wrongfully instituted in a Court which is not competent to entertain them and is not empowered to try the case cannot be transferred to another Court of competent jurisdiction. In the Privy Council case *Ledgard* v. *Bull*[2], there was no question of territorial jurisdiction. It was instituted before a Court which was incompetent to try it not because of want of territorial jurisdiction but because of a prohibition contained in the Act that no action shall be maintained in any Court other than the Principal Court of Original Jurisdiction in a civil case. The Principal Court of Original Jurisdiction in civil case is the District Court. The proceedings can, therefore, be instituted only in the District Court.

1. (1880) I.L.R. 6 Cal. 30.
2. (1886) L.R. 13 I.A. 134 : I.L.R. 9 All. 191 (P.C.).

They cannot be instituted in any other Court. Proceedings instituted in the Subordinate Judge's Court will be void. In short, it is on a par with a case which sometimes arises occasionally or very rarely. Suppose for instance a suit is instituted in the Court of the District Munsiff in respect of a claim for Rs. 5,000. The defendant does not even object to the jurisdiction of the District Munsif's Court. The Court passes a decree. Notwithstanding the fact that the defendant has not raised any objection to the trial of the suit still the proceedings would be null and void as pointed out in *Ram Narain Jossy* v. *Parameswar Narain Metha*[1]. In that case an appeal the subject-matter of which was over Rs. 5,000 in value was wrongly presented and filed in the District Judge's Court and was subsequently upon application by the apellant withdrawn by the High Court under section 25 of the Civil Procedure Code and registered as an appeal to that Court. The order of the withdrawal left it open to the respondent to raise objection on the score of want of jurisdiction of the District Court at the time of the hearing of the appeal. It was held that :

> " When an appeal is transferred under section 25 of the Civil Procedure Code it must be heard subject to all the objections which could be taken before the Court from which it has been transferred and that the High Court, therefore had no jurisdiction to hear the appeal."

The learned Judges refer to the decision in *Ledgard* v. *Bull*[2], and say that though this case is not on all fours with the case they are dealing still the reasons given in that decision would be applicable and that if that Court could not try a suit which was transferred from a Court which had no jurisdiction to try it, it is difficult to see how it can hear an appeal transferred from a Court which had no jurisdiction to hear such appeal. They were of the view that if the lower Court had no jurisdiction to try the case be the defect in jurisdiction with reference to the value or with reference to the situation of the property in dispute or with regard to any ofther matter which concerns jurisdiction, the High Court would have no jurisdiction. They put it on the ground that if the trial Court had no jurisdiction to try the case, the principle of the decision in *Ledgard* v. *Bull*[2], would apply.

The decision in the *Assistant Sessions Judge, North Arcot* v. *Ramammal*[3], follows the decision in *Ledgard* v. *Bull*[2]. The decision in *Re: Sikka Goundan*[4], also follows *Ledgard* v. *Bull*[2] and the same decision is again followed in *Subbamma* v. *Emperor*[5]. But in *Ganapathy Chetty* v. *Rex*[6], which is decision of another bench of this Court, the decision in 36 Madras 387 is referred to by Sadasiva Iyer, J. He observes :

> "It is unnecessary for me to express any final opinion whether the decision in *Queen Empress* v. *Ram Dei*[7] which seems to be opposed to the decision in *Assistant Sessions Judge, North Arcot* v. *Ramammal*[3] does not take the better view. I shall, therefore, proceed on the footing that in the matter before us, *Assistant Sesions Judge, North Arcot* v. *Ramammal*[3] should be followed."

The decision, therefore, purports to follow the decision in spite of the fact that the case which should have been committed only to the Sessions Court at Chingleput had been committed to the High Court Sessions. Sadasiva Iyer, J., justifies the trial by the High Court Session on the ground that the case can be tried by the High Court by transferring the case to its original jurisdiction under section 526, clause (1), sub-clause (i) (*d*) and (*e*) and by passing an order that the offences committed outside the jurisdiction of Madras be also tried in the High Court Criminal Sessions along with other offences which were committed in Madras. If that power is exercised, the trial before the Madras Sessions becomes legal and it then becomes unnecessary to decide the other questions. Spencer, J., who was a party to the decision in *Assistant Sessions Judge, North Arcot* v. *Ramammal*[3] observed that the particular case differed from the case in *Assistant Sessions Judge, North Arcot* v. *Ramammal*[3], and that under section 526, clause (1), sub-clause, (i), the High Court was empowered to make the direction that an

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1. (1897) I.L.R. 25 Cal. 39.
2. (1886) L.R. 13 I.A. 134 : I.L.R. 9 All. 191 (P.C.).
3. (1911) 22 M.L.J. 141 ; I.L.R. 36 Mad. 387.
4. (1922) 17 L.W. 69.
5. (1939) M.W.N. 517.
6. (1919) 37 M.L.J. 160 : I.L.R. 42 Mad. 791.
7. (1896) I.L.R. 18 All. 350.

offence be enquired into or tried by any Court not empowered under sections 177 to 184 but in other respects competent to inquire into or try such offence. In *Ganapathi Chetti* v. *Rex*[1], the case was committed to a wrong Sessions Court but nevertheless the learned Judges held that the wrong Sessions Court could still try the case by exercise of the power under section 526, clause (1), sub-clause (i) of the Criminal Procedure Code (*d*) and (*e*). But it is not quite clear from the judgment whether that power was exercised by passing an order to that effect. In *Rangamannar Chetti* v. *Emperor*[2], Burn, J., without referring to any decision merely held that if there is no jurisdiction in a Court where the case was instituted then the High Court cannot transfer it to a Court of competent jurisdiction. In *Ratnavelu* v. *K. S. Iyer*[3] the facts are these. Two persons were charged for cheating in two cases and were tried by the Sub-Divisional Magistrate of Vellore. The accused objected to the Court at Vellore having jurisdiction to try the case. The Sub-Divisional Magistrate overruled the objection, tried the accused and acquitted them. A revision was filed against the order of acquittal. Lakshmana Rao, J., dismissed the revision petition observing that the Sub-Divisional Magistrate, Vellore, had clearly no jurisdiction to try the case. He also observed that all his remarks relating to the merits of the case must be regarded as mere *obiter dicta*. The complainant filed a fresh complaint before the Chief Presidency Magistrate on the same facts. The Chief Presidency Magistrate dismissed the complaint accepting the plea of *autrefois acquit* raised by the accused. Then the complainant came to this Court with another revision petition against the order of dismissal. A Bench of this Court consisting of Jackson and Mockett, JJ., held that the plea of *autrefois acquit* was available only if the acquittal was by a Court of competent jurisdiction and that the Court without the territorial juridiction is not a Court of competent jurisdiction. The question whether the Sub-Divisional Magistrate had territorial jurisdiction must be decided by the Chief Presidency Magistrate. The Chief Presidency Magistrate was directed to hear the matter. The Chief Presidency Magistrate took evidence and held that the Sub-Divisional Magaistrate, Vellore, had no territorial jurisdiction. He therefore, ordered the Third Presidency Magistrate to dispose of the case according to law. Again there was a revision petition filed against this order of the Chief Presidency Magistrate and this was heard by a Full Bench of this Court and the learned Judges held that the only defect in the jurisdiction of the Vellore Sub-Divisional Magistrate is want of territorial jurisdiction and that this defect is curable under section 531 of the Criminal Procedure Code and therefore the order of acquittal passed by the Sub-Divisional Magistrate, Vellore, could not have been set aside on the ground of want of territorial jurisdiction. It was finally held that these judgments cannot be ignored by the Presidency Magistrate of Madras who are not tribunals superior to the Sub-Divisional Magistrate, Vellore. The learned Judges held that the complaints to the Chief Presidency Magistrate were barred by section 403 of the Criminal Procedure Code. I am referring to this decision just to indicate that notwithstanding the fact that a Court has no territorial jurisdiction still the proceedings of that Court are not void but they are only voidable if I may use that expression. When the proceedings reach the final stage and they are disposed of by the Court which has no territorial jurisdiction, the defect is curable under section 531 of the Criminal Procedure Code. An analysis of the above decisions shows that the cases can be classified under two categories : (1) cases which are void *ab initio* and (2) cases in which the proceedings are not void *ab initio* but are irregular and which are curable under section 531 of the Criminal Procedure Code if a final order is passed. In the Privy Council case, *Ledgard* v. *Bull*[4], the proceedings in the Sub-Court are absolutely void *ab initio*. There was a statutory prohibition to the trial of the suit, by the Sub-Court and therefore the proceedings were void *ab initio*. The Privy Council decision must therefore be confined only to such cases, *i.e.*, where the proceedings are void *ab initio*. In the *Assistant Sessions Judge, North Arcot* v. *Ramammal*[5] which followed *Ledgard* v. *Bull*[4], this aspect of the matter does not appear

1. (1919) I.L.R. 42 Mad. 791 : 37 M.L.J. 60.
2. (1935) M.W.N. 649.
3. (1933) 65 M.L.J. 529 : I.L.R. 56 Mad. 996.
4. (1886) L.R. 13 I.A. 134 : I.L.R. 9 All. 191 (P.C.).
5. (1911) 2 M.L.J. 141 : I.L.R. 36 Mad. 387.

to have been considered. It seems to me that a distinction has to be made between a case where the proceedings are *ab initio* void and a case where the proceedings are not void *ab initio* but are only irregular. To the former class of cases the principle laid down by the Privy Council will certainly apply as it dealt with such a case. The question is whether such a principle can apply to the latter class of cases also. In the *Assistant Sessions Judge, North Arcot* v. *Ramammal*[1], *Ledgard* v. *Bull*[2], has been followed without any discussion though the Privy Council case may well be distinguished. The decision in the *Assistant Sessions Judge, North Arcot* v. *Ramammal*[1] requires reconsideration. I would, therefore, direct that the papers be placed before my Lord the Chief Justice for orders as to reference to a Full Bench for an authoritative pronouncement.

In pursuance of the reference the case was heard by a Full Bench (*Somasundaram, Basheer Ahmed Sayeed* and *Ramaswami, JJ.*).

The Advocate-General (*V. K. Thiruvenkatachari*) and the Public Prosecutor (*P. S. Kailasam*) appeared on behalf of the State.

T. R. Thyagarajan, for the Respondent (accused) in Crl.M.P. Nos. 821 and 827 of 1958.

P. S. Chinnappa, for the Respondents (Accused) in Crl. M.P. No. 823 of 1958.

A. Jagannatha Rao, for the Respondent (Accused) in Crl. M.P. No. 825 of 1958.

A. Nagarajan and *A. Viswanathan*, for Respondent (Accused) in Crl. M.P. Nos. 829 and 831 of 1958.

The Court made the following Order

Ramaswami, J.—The Employees State Insurance Corporation, Madras, filed six charge-sheets against Sri Haji Mohammad Ismail Sahib, in regard to two tanneries Sri V. S. Raghavan, in regard to Revathi Studios, Sri M.H.M. Munas, in regard to Royal Studios, Sri Noor Kazi, in regard to Amco Studios and Sri K. S. Praksh Rao and Sri K. Venkatarama Ayyar, in regard to Prakash Studios, under the Employees' State Insurance Act. The complaints were taken on file by the Chief Presidency Magistrate, Madras, and numbered as C.C. Nos. 2396, 2397, 3545, 3546, 3547 and 3548 of 1958.

In regard to the location of the factories and establishments and the address of the registered office, if any, in the City of Madras, and the addresses of the Offices of the principal employers in these cases, the following information is forthcoming :

In C.C. No. 2396 of 1958, the factory concerned is Messrs. Haji Md. Ismail Saheb Tannery. It is situated in Ellamman Koil Street, Tiruvotriyur, Madras-19. The registered office is also in the same place. The principal employer is Sri Haji Md. Ismail Sahib and his office is situated in No. 17, Sydenham's Road, Periamet, Madras-3.

In C.C. No. 2397 of 1958, the factory concerned is Messrs. Ameen Rahman Tannery. It is situated in Ellamman Koil Street, Madras-19. The registered office is also in the same place. The principal employer is Sri Haji Md. Ismail Sahib and the Manager is Shri Abdul Sukkur and their office is situated in No. 17 Sydenham's Road, Periamet, Madras-3.

In C.C. No. 3545 of 1958, the factory concerned is Messrs. Revathi Studios, situated in Arcot Road, Kodambakkam. The registered office of the factory was also in the same place. The studio was sold on 21st November, 1957 and Sri V. S. Raghavan and Sri V. Rangachari, the principal employer and manager respectively of the Revathi Studios now carry on their correspondence from 110-F, Mount Road, Madras.

In C.C. No. 3546 of 1958, the factory concerned is Messrs. Royal Studios. It is situated at Arcot Road in Vadapalani, Madras. The registered office is also in the same place. The principal employer is Sri M.B.M. Munas and his address is also the same.

† 9th August, 1959.

1. (1911) 22 M.L.J. 141 : I.L.R. 36 Mad. 387.
2. (1886) L.R. 13 I.A. 134 : I.L.R. 9 All. 191 (P.C.).

In C.C. No. 3547 of 1958, the factory concerned is Messrs. Amco Studios, Lessees of Film Centre (P.) Ltd., and Vijaya Cine Laboratories (P.) Ltd. It is situated at Vadapalani. The factory's registered office also is situated in the same place. The principal employer is Mr. Noor Kasi and his office address is also the same.

In C.C. No. 3548 of 1958, the factory concerned is Messrs Prakash Studios. It is situated in Vadapalani, Madras. The factory's registered office is also in the same place. The principal employers are Sri K. S. Prakash and Sri K. Venkatarama Ayyar and their office address is also the same.

The accused persons raised a preliminary objection that the Chief Presidency Magistrate's Court had no jurisdiction and the places where the factories are situated are within the jurisdiction of the Sub-Divisional Magistrate, Poonamallee. Therefore, applications were filed by the Employees' State Insurance Corporation, No. 2, Sir Desikachari Road, Mylapore, Madras-4, for giving either a direction to the Chief Presidency Magistrate to try the various Calendar Cases pending before him or to transfer them to the file of the Sub-Divisional Magistrate, Poonamallee, within whose jurisdiction the factories and establishments are situated as contended by the accused themselves.

The points that arose for consideration before one of us, Somasundaram, J., were (1) whether the Chief Presidency Magistrate had territorial jurisdiction to try the cases and (2) if not, whether the cases could be transferred from the file of the Chief Presidency Magistrate's Court to the file of the Court having jurisdiction to try the cases.

On the first point Somasundaram, J., took the view, on the materials placed before him then, that the Chief Presidency Magistrate will have no jurisdiction to try the cases and that the High Court would have no power to invest that Court with jurisdiction to try the cases.

Regarding the second point, *viz.*, whether the High Court has power to transfer the cases from the file of the Chief Presidency Magistrate to the file of the Court having jurisdiction to try the cases, *i.e.* the Sub-Divisional Magistrate's Court, Poonamallee, the accused contended that such transfer could not be effected and relied on the decisions in *Assistant Sessions Judge, North Arcot* v. *Ramammal*[1]. In re *Sikka Goundan*[2] and *Subbanna* v. *Emperor*[3] and also on certain observations in *Rangamannar Chetti* v. *Emperor*[4]. On these materials then placed before him, our learned brother, as then advised, observed that these decisions appeared to support the stand taken by the defence but considered however that the decision in *Assistant Sessions Judge, North Arcot* v. *Ramammal*[1], which was the basis of all subsequent decisions required reconsideration. In view of conflicting rulings our learned brother felt that the correct scope of sections 346 (1) and 526 (1) (1) should be delimited for guidance of the subordinate Courts and directed that the papers be placed before My Lord the Chief Justice for the matter being heard by a Full Bench for an authoritative pronouncement. This Full Bench has thereupon been constituted by the learned Chief Justice.

Before dealing with the point of law raised, *viz.*, the correct scope of section 346 (1) and 526 (1) and concerning which there are a series of conflicting rulings like the *Assistant Sessions Judge, North Arcot* v. *Ramammal*[1], requiring reconsideration, we have to point out that the learned Advocate-General who appeared at our request, and whose lucid and able exposition was of great assistance to us, was able to convince that in this case the Chief Presidency Magistrate as a matter of fact has got territorial jurisdiction. The general common law rule is that where no place of payment is specified, either expressly or by implication, the debtor must seek the creditor : *Mahaluxmi Bank Ltd.* v. *Chotanagpur I. & C., Assam*[5], *Goniram* v. *Shankar Rao*[6]; *Ramachandra Tajmal* v. *Mohan Lal*[7], *Gokul Das* v. *Nathu*[8], *Drexal* v. *Drexal*[9], *Hagrai* v.

1. (1911) 22 M.L.J. 141 : I.L.R. 36 Mad. 387.
2. (1922) 17 L.W. 69.
3. (1939) 1 M.L.J. 899 : 1939 M.W.N. 517.
4. (1935) M.W.N. 649.
5. A.I.R. 1955 Cal. 413.
6. I.L.R. (1950) Madh. B. 72.
7. A.I.R. 1930 Nag. 207.
8. A.I.R. 1926 All. 477.
9. L.R. (1916) 1 Ch. 251.

Johnson[1], *Yar Mahomed Khan Amir-ud-Din*[2], *Raman Chettiar* v. *Gopalachari*[3]; *Motilal* v. *Surajmal*[4]; *Battappa* v. *Virabhadrappa*[5] and *Ball* v. *Antwerp, London and Brazil Lintas*[6].

It is laid down by Littleton that the obliger of a bond, conditioned for the payment of money at a particular day, is bound to seek the obligee, if he be in England, and at the set day to tender him the money, otherwise he shall forfeit the bond: *Cranley* v. *Hillary*[7]. The Common Law rule is a reasonable rule and it is in conformity with justice and equity because it recognises the obligation of the debtor to pay his debt and that obligation can only be discharged by the debtor going to his creditor and repaying the amount, and the common law rule imposes this obligation only when there is no express contract to the contrary: *Bharumal* v. *Sekhawantmal*[8]. The principle is that when a man agrees to do any particular thing, he must do all that is necessary. If it be to pay money to *A* on a particular day, he must seek *A* : *Soward* v. *Palmer*[9]. Section 49 of the Indian Contract Act does not preclude the application of the rule of English Common Law that the debtor must seek out his creditor and pay his debt where the creditor happens to reside, unless there is an arrangement to the contrary: *M. Ramalinga Iyer* v. *T. K. Jayalakshmi*[10], *K. S. P. L.A. Annamalai Chettiar* v. *Daw Hnin*[11] and *Muhammad Esuff Rowther* v. *M. Hatteem & Co.*[12]

Bearing this principle in mind let us examine the facts of this case. Section 39 of the Employees' State Insurance Act, lays down :

> "The contribution payable under this Act in respect of an employee shall...........be paid to the Corporation."

That payment to the Corporation has to be made at the office in Desikachari Road, Mylapore, Madras-4. Similarly, the returns to be submitted under section 44 of the said Act have to be submitted to the Corporation or to such officer of the Corporation as it may direct. The registers will naturally be maintained by the various factories and establishments in their offices where they are located. In this connection it is contended that by a circular the Corporation has enabled payment to be made in mofussil centres. But this does not relieve the factories and establishments from the obligation under the Common Law rule that the debtor must seek the creditor. In *Draxal* v. *Draxal*[13], it was held that where a payment was bound to be made in England, on the principle of debtor seeking the creditor, the fact that for purposes of convenience the payments were being made in America, would not relieve the debtor from the Common Law obligation and the consequences arising from default thereof.

Therefore, we hold first of all, that the Chief Presidency Magistrate had territorial jurisdiction to enquire into the matter and the fact that different parts of the offence were committed in a different jurisdiction would make no difference. Where it consists of several acts done in different local areas, it may be enquired into or tried by a Court having jurisdiction over any of such local areas ; *see* section 182, Criminal Procedure Code.

Next we shall examine the question whether even assuming that the Chief Presidency Magistrate had no territorial jurisdiction, this Court can confer jurisdiction on the Chief Presidency Magistrate to try those cases according to law.

The jurisdiction of a Magistrate or a Civil Judge to enquire into and dispose of criminal cases and suits depends upon two elements. First of all the Magistrate or the civil Judge must be competent to entertain and dispose of the cases or suits. In the Criminal Procedure Code that competency is set out in Schedule II. In the Civil Procedure Code the competency is determined by pecuniary jurisdiction or by special conferment of powers under statutes or by being designated personally to try and dispose of such suits or proceedings. This competency is different from

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1. A.I.R. 1915 Nag. 65.
2. (1913) 20 I.C. 683.
3. (1908) I.L.R. 31 Mad. 223.
4. (1904) I.L.R. 30 Bom. 167.
5. (1905) 7 Bom. L.R. 993.
6. L.R. (1891) 1 Q.B. 103.
7. (1813) 105 E.R. 327.
8. A.I.R. 1956 Bom. 111.
9. (1815) 129 E.R. 390.
10. (1941) 1 M.L.J. 784 : A.I.R. 1941 Mad. 695.
11. A.I.R. 1936 Rang. 251.
12. (1930) 67 M.L.J. 296: A.I.R. 1934 Mad. 581.
13. L.R. (1916) 1 Ch. 251.

territorial jurisdiction. Both the Criminal Procedure Code and the Civil Procedure Code contains provisions regarding the venue of the Criminal trial (sections 178 to 184 both inclusive of the Criminal Procedure Code and sections 15 to 25 of the Civil Procedure Code). Normally competency and venue must concur. Criminal cases and suits may, however, occur where they do not concur. So provisions are made both in the Civil Procedure Code and the Criminal Procedure Code for meeting such a contingency.

There is one vital difference, however, between the Civil Procedure Code and the Criminal Procedure Code. Civil suits are between individuals and in criminal cases it is the State which is vitally interested and except as regards private complaints the State is the Prosecutor. In fact even in regard to private complaints, the State plays a very important part. Under the scheme of the Criminal Procedure Code which followed in this respect the French Criminal Procedure, two sets of parallel procedure are prescribed for the institution and trial of cases, *viz.*, on complaint to the police and the complainant himself instituting the complaint in the appropriate Court. Under the Civil Procedure Code, if the District Munsif, for instance, finds that he has no pecuniary or territorial jurisdiction to entertain the suit, he will direct the return of the plaint to the party for presentation to the proper Court. Under the Criminal Procedure Code *before a Magistrate takes cognisance* of a case, he is empowered under section 201 of Criminal Procedure Code when the complaint is made in writing and the Magistrate finds himself not competent to return the complaint for presentation to proper Court. *But where cognizance is taken* by a Magistrate as he is bound to take on a complaint preferred by a department of the State without recording a sworn statement under section 200, Criminal Procedure Code, if he finds that he is not competent to try the case or has no territorial jurisdiction, he cannot direct the return of the complaint for presentation to the proper Court. A Magistrate after taking cognizance *must dispose of the complaint* in any one of the ways prescribed under the Criminal Procedure Code, *viz.*, dismissal (section 203) reference to superior Magistrates (sections 346, 349); discharge (section 253); committal (section 347); conviction; acquittal, stoppage of proceedings (section 249). Section 346 (1) of the Code of Criminal Procedure prescribes the procedure of a Sub-Magistrate in cases which cannot be disposed of by him by reason of incompetency or want of territorial jurisdiction. It lays down that *if in the course of the inquiry or a trial before* a Magistrate in any District outside the Presidency Towns, the *evidence appears* to him to warrant a presumption that the case is one which should be tried or committed for trial by some other Magistrate in such district, he shall stay the proceedings and submit the case with a brief report, explaining its nature, to any Magistrate to whom he is subordinate, or to such other Magistrate, having jurisdiction, as the District Magistrate directs. A direct authority on point is *Ramagopal* v. *Dharampal*[1].

The point which arises for consideration from the wording of section 346 (1) is whether this procedure covers only cases of want of competence or want of territorial jurisdiction (confined only within the district) or both. In *District Magistrate of Cuddappah* v. *Abdul Kareem*[2], it was held by Harwill, J., that where the objection is that the Collector should have filed the complaint himself and that he had no power to delegate that right to the Revenue Divisional Officer and that the complaint should have been made to the Sub-Magistrate having jurisdiction at the place where the Collector received the letter are correct, the Magistrate should return the complaint for presentation to the Magistrate having jurisdiction and not forward the papers to his immediate superior under section 346 (1). We do not find any warrant for the limitation placed by Horwill, J. In this opinion we are fortified by a recent Bench decision of the Calcutta High Court in *Amarendra* v. *Raghunath*[3], wherein it was held that there is nothing in section 346 to show that that section has no application to cases of want of territorial or local jurisdiction, that on the other hand the use of the words "some other Magistrate in such district " and "such other Magistrate having

1. (1957) M.P.L.J. (Notes) 177.
2. A.I.R. 1943 Mad. 526 : 1943 M.W.N. 335 : 44 Cr.L.J. 776: (1943) 1 M.L.J. 467.
3. A.I.R. 1952 Cal. 849 : 56 C.W.N. 107 : 1952 Cr.L.J. 1736.

jurisdiction", in section 346 (1) may reasonably be construed to indicate that cases of want of local or territorial jurisdiction are also included within the scope of section 346, that this view is supported by the decision in In re *Mun'swami*[1] and that it is also well to remember in this connection that absence of local or territorial jurisdiction is under the Code a mere irregularity, really curable, and is of much lesser gravity than want of other jurisdiction: *vide* sections 526 (1) (i), 530 and 531, Criminal Procedure Code. In fact the object of these sections is that criminals should not be allowed to escape by reason of technical irregularities. The policy of the Code as shown by section 531 is to uphold in most cases orders passed by a criminal Court which was lacking in local jurisdiction or which has committed illegalities or irregularities unless failure of justice has been occasioned or is likely to be occasioned through such want of jurisdiction or such illegalities or irregularities: *Ganapathi Chetti* v. *Rex*[2]; *Mt. Bhagvati* v. *King-Emperor*[3]; *Asst. Sessions Judge, North Arcot* v. *Ramammal*[4]; (26 M. 640) cures irregular proceedings wrongly held in a wrong local area unless it appears that the error as to territorial jurisdiction has in fact occasioned a failure of justice. Therefore there is no reason to place the very narrow construction as Horwill, J., has done, in his short judgment in which there is no discussion and which also shows that the earlier decisions of this Court were not brought to his notice. See also *Sowbagiammal* v. *Rasheed*[5], to the same effect. Agreeing with the Bench decision of the Calcutta High Court in *Amarendra* v. *Raghunath*[6], we hold that section 346 (1) is wide enough to take in cases of want of territorial or local jurisdiction.

The High Court under section 526 (1) may order that any offence be enquired into or tried by any Court not empowered under sections 177 to 184 of the Criminal Procedure Code, both inclusive but, in other respects competent to inquire into or try such cases. Sections 177 to 184 relate to the place of enquiry or trial. Section 526 (1) empowers the High Court to confer jurisdiction upon a Court not having local jurisdiction but otherwise competent to inquire into and try such offences.

The history of section 526 is significant. Section 35 of the Act XXV of 1861 (First Criminal Procedure Code) empowered the Sudder Court to order transfer of any criminal case of appeal, or inquiry from one criminal Court or District to another if it would promote the ends of justice or tend to the convenience of the parties or witnesses. Section 64 of the 1872 Code gave similar powers to the High Court in almost similar terms. Section 526 of the 1888 Code elaborated this power in terms very similar to those contained in sub-section (1) to (7) of this section of the present Code.

To sum up, the High Court when it is made to appear to it that the circumstances contemplated in clauses (*a*) to (*e*) of section 526 (1) exist, may clothe with jurisdiction any Court not empowered under sections 177 to 184 to inquire into any offences and try the same provided that in other respects that Court is competent to inquire into or try such offences. This is precisely what is asked for in the instant case. On the footing that the Chief Presidency Magistrate's Court has no territorial jurisdiction to enquire into these offences, the learned Public Prosecutor has been instructed to seek our order to clothe the Chief Presidency Magistrate with jurisdiction to enquire into and try these cases. The point is concluded by authority. In *Ganapathy Chetti* v. *Rex*[2], a Bench of this Court held that even assuming that the High Court in its original criminal jurisdiction had no power in the usual course to try the case, the appellate side of the High Court can exercise the power given to the High Court by section 526 (1) for reasons (*d*) and (*e*) contained in section 526 (1) pass an order that the offences committed outside the jurisdiction of Madras be also tried in the High Court Criminal Sessions along with other offences which were committeed in Madras. Spencer, J., who sat with Sadasiva Ayyar, J., who delivered the leading judgment has observed at page 795, that under section 526, the High Court is empowered to make such a direction. Similarly, a Bench of the Bombay High Court in *Queen-Empress* v. *Atma-*

1. 2 Weir 323.
2. (1919) 37 M.L.J. 60: I.L.R. 42 Mad. 791.
3. (1924) I.L.R. 3 Pat. 417.
4. (1911) 22 M.L.J. 141: I.L.R. 36 Mad. 387.
5. (1954) 2 M.L.J. 459.
6. A.I.R. 1952 Cal. 849.

ram Govind[1], has held that where a Sessions Judge on a case being committed to him, reported the case to the High Court under section 526 as he was of opinion that he could not try the case without an order of the High Court, since he found judicially that all the acts constituting the alleged offences with which the accused was charged were committed, if at all, in Bombay, the Bombay High Court can clothe with jurisdiction the Sessions Judge of Ratnagiri to try the case.

Thus, where an offence is being inquired into or tried by a Court contrary to the provisions of sections 177 to 184 of the Code of Criminal Procedure, the error can be rectified by the High Court by an order formally made under the provisions of section 526 (1) that the case be tried by such a Court. *Emperor* v. *Goverdhan Sidkaran*[2], *Mubarak Ali* v. *Abdul Haq*[3], dissented and *Wahib Bux* v. *Emperor*[4]; *Queen Empress* v. *Ram Dei*[5]; *Queen Empress* v. *Thaku*[6]; *Queen Empress* v. *Atmaram Govind*[1]; *Asst. Sessions Judge, North Arcot* v. *Ramammal*[7]; *Ledgard* v. *Bull*[8], *Ganapathi Chetti* v. *Rex*[9], *Emperor* v. *Sheeo Dayal*[10] and *Mubarak Ali* v. *Abdul Haq*[3].

In the light of this analysis the decisions in *Assistant Sessions Judge, North Arcot* v. *Ramammal*[7], in so far as they differ from the scope of sections 346 (1) and 526 (1) (*i*) of the Code of Criminal Procedure as interpreted above cannot be considered to lay down sound law.

This reference to the Full Bench is answered accordingly.

In regard to the instant cases we have already directed that the trials should be proceeded with by the Chief Presidency Magistrate and we confirm that direction.

Basheer Ahmed Sayeed, J.—I have had the benefits of reading the judgment just now pronounced by my learned brother, Ramaswami, J. While I agree with him in the conclusions arrived at, I should like to add a few words of my own.

The facts relating to this reference to the Full Bench have been set out in detail by my learned brother and it is not necessary for me to traverse the same again. Though at an earlier stage a doubt was raised by the learned counsel for the accused as to whether the Presidency Magistrate's Court had local or territorial jurisdiction to try these cases, the learned Advocate-General has, in the course of the hearing of this reference, made it clear that the Chief Presidency Magistrate's Court has jurisdiction to try the offences in respect of which the accused stand charged before him. The learned counsel for the accused contended that since the accused persons own factories which are situated outside the territorial limits of the city of Madras and their Head Offices are also situated outside the city limits, the offences must be deemed to have been committed only outside the territorial jurisdiction of the Chief Presidency Magistrate so as to attract the operation of only section 201 of the Criminal Procedure Code. This argument of the learned counsel for the accused was obviously due to the fact that they ignored that the Employees' State Insurance Corporation itself with its office was situated in the city of Madras and that under the statute and the rules framed under Employees' State Insurance Act (XXXIV of 1948), the contribution as well as the returns had to be paid and submitted respectively to the Corporation wherever its office was situated. The learned counsel for the accused, however, wanted to take advantage of the fact that by certain circular issued under the Employees' State Insurance Act, a facility was afforded to the owners of factories to pay their contribution to the treasuries situated outside the city limits and thereupon contended that the jurisdiction of the Chief Presidency Magistrate was ousted thereby. But the language of sections 39 (1), 40 and 44, reasonably understood, points only to the conclusion that the contributor had to make the payment of his contribution to the Corporation wherever its office was situated; even so, the return

1. (1900) 2 Bom.L.R. 394.
2. A.I.R. 1928 Bom. 140 : 29 Cr.L.J. 533.
3. A.I.R. 1925 Oudh 490 : 25 Cr.L.J. 577.
4. A.I.R. 1929 Sind 250 : 30 Cr.L.J. 1121.
5. (1896) I.L.R. 18 All. 350.
6. (1884) I.L.R. 8 Bom. 312.
7. (1911) 22 M.L.J. 141 : I.L.R. 36 Mad. 387.
8. (1886) I.L.R. 9 All. 191 : L.R. 13 I.A. 134 (P.C.).
9. (1919) 37 M.L.J. 60 : I.L.R. 42 Mad. 791.
10. (1919) 23 O.C. 87 : A.I.R. 1919 Oudh 69 (1).

have to be submitted to the office of the Corporation where it is situated. The place of payment as also the submission of the returns, notwithstanding the fact that a facility was extended to the contributors to make payments to the nearest treasury prescribed, is only to the Corporation at its office, wherever its office is situated. The treasuries are merely the agents of the Corporation for the mere purpose of receiving the payment and no more. The series of decisions cited before us by the learned Advocate-General and referred to by my learned brother Ramaswami, J., in his judgment, make it clear that the payment of the contribution due to the Corporation and also the submission of the returns, has to be done only at the place where the Corporation is situated, and the mere fact that some facility is afforded to the contributors, for the sake of convenience, to make payments outside the city limits would not by any means displace the legal obligation on the part of the contributors to pay their contributions and submit their returns to the Corporation at the place where the Corporation is having its office. The circular, therefore, relied on by the accused, dated 6th February, 1952, canot be deemed to be a contract to the contrary between the parties and does not, in any way, absolve the contributors from the ordinary legal responsibility of a debtor being bound to seek the creditor and make the payment and discharge his obligations. Therefore, if a breach is committed, it is only a breach of the obligation to pay the Corporation at its office and not otherwise.

The next question that was argued by the learned counsel for the accused was that the High Court had no power under the Criminal Procedure Code to order the cases in question to be tried by the Chief Presidency Magistrate or to direct a transfer from the Court of the Chief Presidency Magistrate to another Court, if the Chief Presidency Magistrate's Court was not already vested with the territorial jurisdiction to try such cases. This argument proceeded on the assumption that the Chief Presidency Magistrate's Court had no jurisdiction to try the offences because the offences were committed outside its local jurisdiction and when once there was no local jurisdiction for the Chief Presidency Magistrate, then the complaints filed before it became ineffective, and the only alternative for the Chief Presidency Magistrate was to act under section 201, Criminal Procedure Code, section 346, Criminal Procedure Code being of no avail to a Court situated within the presidency town. This argument also ignored the distinction that exists between the local or territorial jurisdiction of a criminal Court as contrasted with the competence of a criminal Court to try offence. The analogy of section 24 of the Civil Procedure Code applicable to transfer of the pending civil cases was largely pressed into service in support of the contention of the learned counsel for the accused that unless circumstances similar to those contemplated under section 24 of the Civil Procedure Code were available, the High Court could not order transfer or direct the Court, which has no local jurisdiction, to try offences of the type in question. But the very patent distinction which exists between the powers exercisable under section 24 of the Civil Procedure Code and the powers exercisable under section 526 (1) (*e*) (*i*) of the Criminal Procedure seems to have been lost sight of by the learned counsel for the accused. A reading of section 526 (1) (*e*) (*i*), Criminal Procedure Code, would disclose that the powers of the High Court under this section are far wider than those contemplated under section 24, Civil Procedure Code. Lack of local or territorial jurisdiction does not appear to be bar against the High Court directing a criminal Court which is otherwise competent to try offences even though the offences were not committed within its territorial jurisdiction, provided all or any of the conditions specified in section 526 (1) (*a*), (*b*), (*c*) (*d*) and (*e*) are satisfied. Section 526 (1) (*e*) (*i*) specifically vests the High Court with powers to order that any offence be inquired into or tried by any Court not empowered under sections 177 to 184 (both inclusive), but in other respects competent to inquire into or try such offences whenever it is made to appear to the High Court that such order is expedient for the ends of justice or is required by any provision of the Criminal Procedure Code or when it is made to appear that an order under this section will tend to the general convenience of the parties or witnesses.

The series of decisions cited before us by the learned Advocate-General on this aspect of the case, commencing from *Queen-Empress* v. *Atmaram Govind*[1], and ending with *Amarendra* v. *Raghunath*[2], viewed in their proper light, make it clear that the powers of the High Court, in the matter of transfer of criminal cases from one Court to another or to pass orders directing that an offence be enquired into by any Court not empowered under sections 177 to 184, Criminal Procedure Code, are not circumscribed by the requirements contemplated in section 24, Civil Procedure Code, but that they are of much wider scope. The Legislature seems to have deliberately enacted this difference with a view to secure efficient administration of criminal justice.

The learned counsel for the accused, however, relied on certain decisions of single Judges of this Court wherein it has been held that resort to section 201, Criminal Procedure Code, would be the proper remedy of a Magistrate who has no territorial jurisdiction to try offences for which a charge has been laid before him. In particular, reference was made by the learned counsel for the accused to the decisions in *Sowbagiammal* v. *Rasheed*[3], and *District Magistrate* v. *Abdul Kareem.*[4] It is but fair to point out that in these decisions the powers of the High Court under section 526 (1) (*e*) (*i*) did not come up for consideration and the decisions were merely confined to the proper section that was to be resorted to by the Magistrate, *viz.*, whether it was section 201 or section 346 (1), Criminal Procedure Code. As between the two sections, section 346 and section 201 of the Criminal Procedure Code decisions were that the proper remedy was to take action under section 201, Criminal Procedure Code. These decisions, therefore, could not be authority for the proposition now contended for on behalf of the accused that the only course open in the present cases to the Magistrate or to the High Court was to take action or direct action being taken under section 201, Criminal Procedure Code, disregarding the very wide powers vested in the High Court under section 526 (1) (*e*) (*i*) of the Criminal Procedure Code. In these decisions, the powers of the High Court under section 526 (1) (*e*) (i) were not invoked and the relief sought was confined to a very narrow issue. Questions such as the venue of the Trial Court and its competency to try offences as distinct from the power of the High Court to clothe, with territorial jurisdiction, any Court, even if it did not possess territorial or local jurisdiction, were never adverted to in those decisions relied upon by the learned counsel for the accused. The decision in *Ganapathy Chetti* v. *Rex*[5], is still good law, being in conformity with the policy underlying section 526 (1) (*e*) (*i*), Criminal Procedure Code.

In the result, I agree that the order that we have already passed in the matter should be confirmed.

Somasundaram, J.—I agree with my learned brothers Ramaswami and Basheer Ahmed Sayeed, JJ.

R.M. ——— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

C. P. Kasi Thevar .. *Petitioner**

v.

Chinniah Konar .. *Respondent.*

Criminal Procedure Code (V of 1898), sections 479-A and 479-A (6)—Scope and applicability—Procedure in cases of false evidence.

In a Calendar Case where the petitioner was the accused the respondent as a prosecution witness denied in cross-examination that he was speaking to a falsehood. Two months after the order of acquittal passed in that case the petitioner filed a petition before the same Sub-Magistrate that the respondent had committed perjury in the Calendar Case. A complaint followed under section 476, Criminal Procedure Code.

1. (1900) 2 Bom. L.R. 394.
2. A.I.R. 1952 Cal. 849.
3. (1954) 2 M.L.J. 459.
4. (1943) 1 M.L.J. 467 : A.I.R. 1943 Mad. 526.
5. (1919) 37 M.L.J. 60 : I.L.R. 42 Mad. 791.

* Crl.R.C. No. 124 of 1959 (Crl. R. P. No. 124 of 1959). 30th June, 1959.

Held : The conditions necessary for the application of section 479-A, Criminal Procedure Code, are that the Court before it delivers judgment or at the time of delivering judgment must form an opinion that a witness is giving false evidence. A Court must come to a conclusion that a witness is committing perjury only when there are materials placed before it to justify that opinion. From a mere suggestion and denial the Court cannot come to a conclusion.

Section 479-A and clause (6) thereof cannot apply to a case where it is only after the judgment was delivered that the necessary documents which will establish the falsity of the witness were obtained and it is only after the obtaining of the documents and after bringing them to the notice of the Court in the petition filed that the falsity of the evidence became apparent.

Jai Bir Singh v. *Malkhan Singh,* A.I.R. 1958 All. 364 (S.B.) and *Parshotam Lal* v. *Madan Lal,* A.I.R. 1958 Punj. 145 (D.B.), dissented.

In re *Ponneri Dasi Reddy,* A.I.R. 1958 Andh. Pra. 657 and *Abdul Jabar,* In re (1958) M.L.J. (Crl.) 233 and *Muniamma,* In re (1958) M.L.J. (Crl.) 859, distinguished.

Observations of Sadasiviah, J. in *Nanjappa* v. *Chikkaramia,* 1958 M.L.J. (Crl.) 491 (493), dissented.

Petition (disposed of on 30th June, 1959) under sections 435 and 439, Criminal Procedure Code, 1898, praying the High Court to revise the Order of the District Magistrate (J.) of Ramanathapuram at Devokattai, dated 9th December, 1958, in Crl.R.P. No. 29 of 1958, to set aside the Order of the Additional First Class Magistrate, Devakottai, dated 17th September, 1958, in C.C. No. 98 of 1958.

M. Srinivasagopalan, for Petitioner.

S. V. Jayaraman, for Respondent.

V. V. Radhakrishnan, for The Public Prosecutor, for State.

The Court made the following

ORDER.—This is a revision filed against the order of the District Magistrate, Ramanathapuram, in Crl.R.P. No. 29 of 1958.

The circumstances under which this revision is filed are these : In C.C. No. 762 of 1958, on the file of the Sub-Magistrate of Tirupattur, the petitioner herein, *i.e.,* Kasi Thevar, was the third accused. The respondent herein, *i.e,* Chinniah Konar was examined as prosecution witness 4 in the case. On behalf of the petitioner herein P.W. 4 was cross-examined and in the cross-examination a suggestion was put, namely, whether P.W. 4 did not file a tender in Keelasevalpatti Panchayat Board and whether the tender of the third accused (petitioner) was not accepted in preference to that of P.W. 4 and whether P.W. 4 did not give a petition against accused 3 in that case and the Executive Officer. The witness denied all these suggestions and stated that he filed a tender in Keelasevalpatti and that it was wrong to suggest that the tender of the third accused was accepted. He also added that it is wrong that he gave a petition against the third accused and the Executive Officer regarding that matter. He denied that he is speaking to a falsehood regarding that matter. C.C. No. 762 of 1958 ended in acquittal. The order of acquittal was passed on 19th May, 1958, . About two months later, *i.e.,* on 16th July, 1958, the petitioner herein, *i.e.,* Kasi Thevar, after obtaining the necessary documents, put in a petition before the Sub-Magistrate who tried C.C. No. 762 of 1958, *i.e.,* before the Sub-Magistrate, Tirupattur, stating that the respondent herein had committed perjury in the previous case, *i.e.,* C.C. No. 762 of 1958, and that a complaint should be laid against him for the offence of perjury. The Magistrate, after issuing notice to P.W. 4 in that case, that is, to the respondent herein, held an inquiry in the course of which the petitioner herein produced the relevant documents to establish that the respondent committed perjury in the previous case. The Court, after satisfying itself that the respondent committed perjury in C.C. No. 762 of 1958 when he made the statement that the third accused's tender was not accepted in preference to his and that he made no complaint whatsoever, filed complaint under section 476, Criminal Procedure Code. The Additional First Class Magistrate, Devokattai, before whom the complaint was filed, dismissed the complaint holding that this complaint should have been filed under section 479-A, Criminal Procedure Code, and clause (6) of section 479-A is a bar to proceedings under sections 476 to 479. Against the said order a revision was filed before the District Magistrate,

who, following the decision of the Allahabad High Court, in *Jai Bir Singh* v. *Malkhan Singh*[1], confirmed the order of the First Class Magistrate and dismissed the revision. It is against the said order that this revision has been filed.

From the facts narrated above it is quite clear that when the Sub-Magistrate disposed of the case in C.C. No. 762 of 1958, *i.e*, when he delivered the judgment on 19th May, 1958, there was no material from which he could have formed an opinion that the respondent had given false evidence. It was only a suggestion made by the petitioner herein to the respondent when he was in the witness box and the suggestion was denied by the witness. Beyond this suggestion and the denial by the witness there was no other material brought to the notice of the Court from which the Court can form an opinion as to whether the witness was telling a falsehood or speaking to a truth. The suggestion may be well-founded or may be ill-founded. The denial may be right or may be wrong. It was in this state of uncertainty without any clinching circumstances to prove either way, that the evidence of the respondent as P.W. 4 had to be judged. Thus, at the time when the Sub-Magistrate delivered the judgment, it cannot be said that the Magistrate had material to form an opinion that the evidence of the respondent as P.W. 4 was false.

Section 479-A, Criminal Procedure Code, so far as it is relevant for the purpose of this case is as follows:

"Notwithstanding anything contained in sections 476 to 479 inclusive, when any Civil, Revenue or Criminal Court *is of opinion* that any person appearing before it as a witness has intentionally given false evidence in any stage of the judicial proceeding or has intentionally fabricated false evidence for the purpose of being used in any stage of the judicial proceeding. . . . . . it is expedient that such witness should be prosecuted for the offence which appears to have been committed by him, the Court shall, *at the time of the delivery of the judgment* or final order disposing of such proceeding, record a finding to that effect stating its reasons therefor and may, if it so thinks fit, after giving the witness an opportunity of being heard, make a complaint thereof in writing signed by the presiding officer of the Court, etc., etc."

Clause (6) of this section is as follows:

"No proceedings shall be taken under sections 476 to 479 inclusive for the prosecution of a person for giving or fabricating false evidence, if in respect of such a person proceedings may be taken *under this section.*"

It is pointed out by Mr. Srinivasagopalan appearing for the petitioner that the Magistrate could not have formed an opinion about the falsity of the evidence of P.W. 4 at the time of the delivery of the judgment; and, therefore, section 479-A will not apply. Further under the provisions of Clause (6), the bar to the proceedings under sections 476 to 479, Criminal Procedure Code, comes in only when proceedings may be taken under the provisions of section 479-A. If proceedings could not be taken under section 479-A then the provisions of clause (6) do not operate as a bar for proceedings under sections 476 to 479.

It seems to me that there is considerable force in the above contention. Section 479-A, Criminal Procedure Code, itself clearly states:

"When the Court *is of opinion* that any person appearing before it as a witness has intentionally given false evidence, the Court shall, *at the time of the judgment or final order record* a finding to that effect."

The conditions, therefore, necessary for the application of section 479-A, are that the Court before it delivers its judgment or at any rate at the time of delivering the judgment must form an opinion that a particular witness or witnesses, is, or are, giving false evidence; if the Court could not form any opinion about the falsity of the evidence of the witness appearing before it, then certainly the Court cannot at the time of delivering its judgment, record any finding about the same. A Court can come to a conclusion that a witness is false only when there are materials placed before it to justify that opinion. If no materials were placed before the Court to enable the Court to form an opinion that a witness is giving false evidence, then certainly it could not form that opinion. From a mere suggestion and denial no Court will ever come to the conclusion that a witness by his denial is giving false evidence as the suggestion may be either well-founded or ill founded. The petitioner herein at the time when he cross-examined the respondent was not in

1. A.I.R. 1958 All. 364.

possession of the necessary documents by which he could confront the witness that is, the respondent, and draw the attention of the Court as to how in the light of these documents he has given false evidence. It is only after the judgment was delivered that the necessary documents which will establish the falsity of the evidence of the respondent were obtained and it is only after the obtaining of those documents, and after bringing them to the notice of the Court in the enquiry on the petition filed by him, the falsity of the evidence of the respondent became apparent. Till those documents were produced there was no opportunity or occasion for the Magistrate to form an opinion about the falsity of the evidence of the witness. It is, therefore, quite clear that at the time when the judgment was delivered the Magistrate was not in a position to form an opinion and that is an essential pre-requisite for proceedings under section 479-A, Criminal Procedure Code. The circumstances namely that the Court must form an opinion about the falsity of the evidence, and, at the time of the delivery of the judgment it should have formed such an opinion are not present in this case. Section 479-A will not therefore apply to the facts of this case, and, if section 479-A will not apply to the facts of this case, certainly clause (6) cannot apply because clause (6) can be invoked only to cases to which section 479-A will apply. In this view I must hold that the orders of the lower Courts in dismissing the complaint are wrong.

Learned counsel for the respondent relies upon the judgment of the Allahabad High Court in *Jai Bir Singh* v. *Malkhan Singh*[1], (judgment of a single Judge) ; and the judgment of the Punjab High Court in *Parshotam Lall* v. *Madanlal*[2], a decision of a Bench of that Court. With great respect to the learned Judges of those High Courts I am unable to agree with their reasoning as it seems to me that the section is very clear in its scope. The learned counsel also relied on three decisions of the Andhra Pradesh High Court and one decision of the Mysore High Court. The three decisions of the Andhra Pradesh High Court are the decisions of Basi Reddi, J. They are : In re *Ponneri Dasi Reddi*[3], *Abdul Jabbar*, In re[4], and *Muniamma*, In re[5], and the decision of the Mysore High Court is *Narajappa* v. *Chikkaramiah*[6]. From the three decisions of the Andhra Pradesh High Court it is quite clear that the witness after giving the statements under section 164, Criminal Procedure Code, went back on their statement when they came to Court. There was, therefore, material for the Court to come to the conclusion that the witness was giving false evidence. The cases, therefore, exactly fell within the provisions of section 479-A and it was rightly pointed out in those decisions that in cases where section 479-A applies, under the provisions of clause (6) there was a bar to the proceedings under sections 476 to 479. In *Narajappa* v. *Chikkaramiah*[6], the facts fully justified the conclusion arrived at by the learned Judge. There was one observation in the judgment of the Mysore High Court with which I must respectfully disagree. It is a judgment of M. Sadasiviah, J. and the observation is at page 493. It is as follows :

> "Once the person has appeared as a witness before the Court, then, it will be the provisions of section 479-A of the Code that will be applicable and not any of the provisions contained in sections 476 to 479 of the Criminal Procedure Code."

With great respect, I must point out that this statement seems to be rather wide. It is not only that a person should appear as a witness in Court but he must further by his evidence drive the Court to form an opinion that he is giving false evidence. If at the time of the delivering of the judgment in the case the Court could not form any opinion that the witness was giving false evidence then, certainly, his mere appearance as a witness will not justify the Court to take action under section 479-A. The section is limited in scope. But the observation seems to be very wide. I therefore respectfully dissent from that observation with this limitation namely that it is only when the Court can form an opinion that the witness is giving false evidence,

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1. A.I.R. 1958 All. 364.
2. A.I.R. 1959 Punj. 145.
3. A.I.R. 1958 A.P. 657.
4. (1958) M.L.J. (Crl.) 233: (1958) 1 An.W.R. 212.
5. (1958) M.L.J. (Crl.) 859: (1958) 2 An.W.R. 509.
6. (1958) M.L.J. Crl. 491.

section 479-A, Criminal Procedure Code, will apply and not in all cases when a person appears as a witness.

For the reasons mentioned above, I set aside the order of the lower Court and restore the complaint before the Additional First Class Magistrate, and the case will be transferred to the file of some other First Class Magistrate by the District Magistrate for disposal according to law.

V.S. ——— *Order set aside and complaint restored.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBRAHMANYAM.

Thanappa Goundar and others .. *Petitioners**

v.

Sabapathy Goundar .. *Respondent.*

Criminal Procedure Code (V of 1898), section 145 (1)—Scope and applicability.

In order that a dispute relating to possession of land might give jurisdiction to a Magistrate to take action under section 145 (1), Criminal Procedure Code, the dispute need not be one relating to land or building claimed by a person as owner. Even the possession of a trustee or guardian will be protected under the provisions. So long as one person claims to be in possession to the exclusion of others and alleges that some other person seeks unlawfully by force to interfere with his possession, which, if it is likely to lead to a breach of the peace would justify and necessitate a Magistrate taking actions under section 145, Criminal Procedure Code.

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court Court will be pleased to quash the proceedings in M.C. No. 11 of 1959 on the file of the Court of the Executive First Class Magistrate, Tindivanam.

K. Narayanaswami Mudaliar, for Petitioners.

The Court made the following

ORDER.—This is an application to quash the proceedings now pending before the Executive First Class Magistrate, Tindivanam, in M.C. No. 11 of 1959 on his file under section 145 (1), Criminal Procedure Code. The respondent filed an application before the Executive First Class Magistrate in April, 1959, alleging that he (the respondent) was in exclusive management of the affairs of a temple known as Mariamman Koil in Nallur village as its trustee and Dharmakartha, that he had to perform certain festivals in the temple, that the petitioners herein were attempting by force to lock the doors of the temple and prevent the respondent herein from performing the festivals and praying that the Sub-Inspector of Police, Bramadesam, be directed to enquire and report regarding the facts and that an order be passed directing the petitioners not to interfere with the respondent managing the temple, and its properties and affairs. On the basis of that petition, the learned Executive First Class Magistrate issued a preliminary order under section 145 (1), Criminal Procedure Code. He was of opinion that a dispute likely to lead to a breach of the peace existed relating to the possession of the temple and its properties. The petitioners filed a statement of claim. The petitioner's case is that they and the respondent are in possession of the temple and its properties as joint trustees and that the respondent does not have a right to manage the temple and its affairs as its sole trustee. Proceedings are now pending before the Executive First Class Magistrate.

The petitioners contended that the Executive First Class Magistrate does not have jurisdiction to take action under section 145 (1), Criminal Procedure Code, regarding the subject-matter of this dispute. In support of that proposition, the petitioner's learned counsel relies on *Surendranath Banerjee* v. *Sashibushan Sarkar*[1]. It

* Crl. Mis. P. No. 717 of 1959. 26th May, 1959.
5(th Jyaisha, 1881—Saka).

1. (1925) I.L.R. 52 Cal. 959.

was held in that case that the right to perform the pooja of an idol or to have a share of the offerings made to the idol could not be said to be a right to user of any land as explained in section 145, Criminal Procedure Code. In the case before us, the dispute does not relate to the right of performing pooja, or to any share in the offerings made to the idol but to the management of the temple and its affairs. Basic to the right of management is possession of the temple building and its properties. A person who claims to be the sole trustee, claims thereby to be in exclusive possession of the temple and of its properties. Being in such possession, he claims that nobody else should interfere with his possession of the temple and its properties or with his right to manage the affairs of the temple or his acts of management. If some other person contests that claim and says that he and the former are joint trustees, then the claim of the person who contests is that the right to possession is vested not in the petitioner only but in the petitioner and the respondent, and that in fact both of them are in joint possession. Contentions of that kind immediately give rise to a dispute relating to possession. In order that a dispute relating to possession might give jurisdiction to a Magistrate to take action under section 145, Criminal Procedure Code, the dispute need not be a dispute relating to land or building claimed by a person as owner, that is to say, as a person entitled to the full beneficial enjoyment. A dispute regarding possession may be a dispute regarding possession as trustee or as guardian or in any other fiduciary capacity. So long as one person claims to be in possession to the exclusion of another and alleges that that other person seeks unlawfully and by force to interfere with the former's possession and the latter asserts that he is in joint possession and is entitled to resist the former's claim to exclusive possession, there is a dispute relating to possession, which, if it is likely to lead to a breach of the peace would justify and may indeed necessitate, a Magistrate taking action under section 145, Criminal Procedure Code. I am unable to agree with the petitioners' learned counsel that the dispute in respect of which the learned Magistrate is taking action (M.C. No. 11 of 1959) is not a dispute to which section 145, Criminal Procedure Code, could apply.

The next contention urged on behalf of the petitioner is that there are proceedings pending before the Deputy Commissioner for Hindu Religious and Charitable Endowments relating to the rights of parties to trusteeship and that the pendency of those proceedings bars, under section 93 of the Madras Hindu Religiou- and Charitable Endowments Act, the jurisdiction of the Executive First Class Magistrate to hold an enquiry under section 145, Criminal Procedure Code. The Deputy Commissioner for Hindu Religious and Charitable Endowments does not have jurisdiction to pass any orders to prevent a breach of the peace. While proceedings are taking place before him, peace should be maintained. The jurisdiction to pass orders relating to prevention of breaches of the peace pertains exclusively to the magistracy. Therefore nothing that is pending before the officers of the Hindu Religious and Charitable Endowments Department could take away the jurisdiction of the Executive First Class Magistrate to take action under section 145, Criminal Procedure Code, or indeed furnish any justification for him for refraining from taking such action if the dispute relating to possession is such as might lead to a breach of the peace. The pendency of proceedings before the officers of the Hindu Religious and Charitable Endowments Department does not deprive the learned Executive First Class Magistrate of his jurisdiction to proceed with the enquiry pending in M.C. No. 11 of 1959 on his file.

This Petition is dismissed.

R.M. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

N. K. P. Thirupathi Chettiar and others .. *Petitioners**

Madras Gaming Act (III of 1930), *sections* 5 *and* 6—*Officer empowered to issue warrant for search himself conducting the search —Seizure of instruments of gaming—When evidence—' Common gaming house '—What is.*

It is no doubt true that under section 5 of the Madras Gaming Act it is open to a Police Officer empowered to issue a search warrant to himself conduct the search instead of issuing a warrant to his subordinate. The instruments of gaming, if any, seized during such a raid would be evidence under section 6 of the Act in such cases also.

But in order to raise the presumption under section 6 of the Act the officer issuing the warrant or making a raid should be satisfied that the place was used as a common gaming house. Mere gaming in a place will not make it a ' common gaming house' which has a particular meaning under the Act.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Court of the District Magistrate (J.), Tiruchirappalli in C.A. No. 121 of 1958 (C.C. Nos. 2053 to 2078 of 1957 on the file of the Court of the Second Class Magistrate, Tirumayam).

B. T. Sundararajan, for Petitioners.

Miss Bhyme and *V. V. Radhakrishnan*, for the Public Prosecutor for the State.

The Court made the following

ORDER.—These twenty-three petitioners are accused 1 to 9, 11, 12, 13, 15 and 17 to 26 in C.C. Nos. 2053 to 2078 of 1957 on the file of the Second Class Magistrate, Tirumayam. They were all convicted under section 9 of the Madras Gaming Act and sentenced to pay a fine of Rs. 100 each. In addition accused 26 was convicted under section 8 and sentenced to pay a fine of Rs. 200.

The accused are said to have been playing cards in a common gaming house run by accused 26. The Sub-Inspector raided the place and it is said that the Deputy Superintendent of Police also was in the party of the police who raided the place. Instead of issuing a warrant under section 5 (1) of the Madras Gaming Act, under sub-section (2) of section 5, any police officer having power to issue a warrant under sub-section (1), may instead of doing so, himself exercise all or any of the powers exercisable under such warrant. The Deputy Superintendent of Police, therefore, instead of issuing a warrant may well exercise all or any of the powers exercisable under such warrant, that is, he can raid the place and seize the instruments of gaming and other things. In short instead of issuing a warrant to subordinate police officers by virtue of which a Sub-Inspector or other police officer below the rank of a Deputy Superintendent of Police can go to a common gaming house, arrest the persons and seize the instruments, the Deputy Superintendent of Police himself can go in person and raid that place. Under section 6, the instruments of gaming which are seized shall be evidence, that is, if they are seized in pursuance of a warrant under section 5. As the Deputy Superintendent of Police can himself go and seize the instruments without issuing a warrant, the provisions of section 6 will be applicable to him if all the conditions mentioned in section 5 are satisfied. That is to say, the Deputy Superintendent of Police must be satisfied and must have reason to believe that the place in question is used as a common gaming house. In his evidence he does not say that he received information that the place was used as a ' common gaming house.' The offence under the Act is gaming in a " common gaming " house. Common gaming house is defined in the Act thus :

" Common gaming house means any house, room, tent, enclosure, vehicle, vessel or any place whatsoever in which cards, dice, tables or other instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using or keeping such house, room, tent, enclosure, vehicle, vessel or place whether by way of charge for the use of instruments of gaming or of the house, room,

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* Crl.R.C. No. 738 of 1958.
(Crl.R.P. No. 706 of 1958.)

24th April, 1959.
(4th Vaisakha, 1881—Saka.)

tent, enclosure, vehicle, vessel or place opened, kept, or used, or permitted to be opened kept or used for the purpose of gaming ; . . . ."

As it is difficult to prove that the person owning the premises is earning a profit out of it, a provision like section 6 is introduced. In order, therefore, to raise, if I may use the word, the presumption under section 6 that the various instruments seized will be evidence that the place was used as a common gaming house without any further evidence about it, the officer issuing a warrant or making the raid shall satisfy himself that the place was used as a common gaming house. The expression " common gaming house " is used with a particular meaning given to it in the Act. Mere gaming in a place will not make it a common gaming house. The Deputy Superintendent of Police in his evidence merely says that he had information that the place was used occasionally as a gaming house. He does not say that he had information that the place was used as a common gaming house which is the essential pre-requisite for the issue of warrant. Nor does the Deputy Superintendent of Police say in his evidence that he was satisfied or he had reason to believe the information given to him that the place was used as a common gaming house. In the circumstances, therefore, even if the Deputy Superintendent of Police raids the place along with the other police officers without issuing the warrant the necessary presumption under section 6 cannot be drawn. But in this case the prosecution has put in P.W. 4 to prove by other evidence that accused 26 is running a common gaming house, that is to say, to establish that accused 26 is making a profit out of the game played in his house. If P.W. 4's evidence is acceptable, then undoubtedly the place is run as a common gaming house, and whatever is seized will be evidence to show that the house is used as a common gaming house. He is a witness who has been once convicted of rioting. He also says that he has given evidence in a murder case. A reading of his evidence does not impress one as evidence which could be accepted in a case of this nature. If therefore the evidence of P.W. 4 is excluded there is no other evidence to show that the place is used as a common gaming house. The presumption not being available in this case, and as there is no other evidence to show that the place is used as a common gaming house, the fact that these accused were merely playing cards would not amount to gaming in a common gaming house. There is nothing wrong and no offence is committed if a number of persons join together and play cards even if the stakes are high unless the game is played in a common gaming house. Since it is not proved by evidence under section 6, for the reasons I have already mentioned, it cannot be said that the offence has been brought home to these accused.

The convictions and sentences of these accused are, therefore, set aside and the accused are acquitted and the fines if paid will be refunded.

The monies and other articles seized from the various persons will be returned to them.

R.M. ——— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

Nijam Mohideen *alias* Rajan Mohamed and others .. *Petitioners**

Constitution of India (1950), *Article* 134 (1) (c)—" *Final order* "—*Order on bail application—Application leave to appeal to the Supreme Court—Maintainability.*

An order on a bail application, whether granting or refusing of bail to an accused, is not a "final order" falling within Article 134 (1) (c) of the Constitution, as it does not decide the issue between the parties and as it does not result either in conviction or in acquittal of the accused. Hence Article 134 (1) (c) will not apply and an application for the grant of a certificate for leave to appeal to the Supreme Court from such order is incompetent.

Krishna v. *State*, (1955) M.W.N. (Crl.) 114 and *Dhanalakshmi* v. *Income-tax Officer*, A.I.R. 1958 Mad. 151, applied.

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* Crl. M.P. No. 887 of 1959. 20th August, 1959.
(29th Sravana, 1881—Saka).

Petition praying that in the circumstances stated therein the High Court will be pleased to issue a certificate that this is a fit and proper case for leave to appeal to the Supreme Court of India against the order of the High Court, dated 21st July, 1959 and made in Crl.M.P. No. 887 of 1959 presented for the release of the petitioners therein on bail pending enquiry in P.R.C. No. 1 of 1959 on the file of the Court of the Additional I Class Magistrate, Cuddalore.

V. Gopinathan, for Petitioners.

M. Narayanamurthy, for the Public Prosecutor on behalf of the State.

The Court made the following

ORDER.—This is an application for leave to appeal to the Supreme Court against the order passed by me in Crl.M.P. No. 887 of 1959 refusing bail to the petitioners. The office has put up a note pointing out that such an application does not lie. This matter has been posted for orders on the note put up by the office. The question is whether such an application lies.

This is presented under Article 134 (1) (*c*) of the Constitution. Under Article 134 (1) an appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceedings of a High Court. The question is whether an order passed in the above Criminal Miscellaneous Petition is a final order. The *Explanation* to Article 132 states that the expression " final order " includes an order deciding an issue which if decided in favour of the appellant, would be sufficient for the final disposal of the case. An order on a bail application, even if it is in favour of the petitioners, would certainly not decide the case in their favour, that is to say, will not result in an acquittal. It is well known that an order releasing the accused on bail can be cancelled subsequently. Equally an order refusing bail at one stage may also be modified subsequently by an order directing the petitioners to be released on bail. The principle laid down in *Krishna* v. *State*[1], and *Dhanalakshmi* v. *Income-tax Officer*[2], will apply with equal force to an order on a bail petition as it cannot be said to be a final order in as much as it does not decide the issue between the parties and as it does not result either in conviction or acquittal of the petitioners. This not being a final order, Article 134 (1) (*c*) will not apply. Therefore this petition is incompetent and is rejected.

P.R.N. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. P.V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE GANAPATIA PILLAI.

Council of Institute of Chartered Accountants of India .. *Referring Authority**

v.

V. Rajaram of Messrs. V. Rajaram & Co., Chartered Accountants .. *Respondent.*

Chartered Accountants Act (XXXVIII of 1949), *section* 21 (2), *clause* (1) *of Schedule—Verification of the assets of a company—Duties of a statutory auditor.*

The auditor should himself verify the assets of the company of which he had been appointed auditor. His duty in verifying the assets is two-fold, *i.e.,* whether they really existed at the relevant date and whether they are valued properly.

The conduct of the auditor in certifying that he had himself not verified the securities and documents relating to the book-debts but had accepted the report of the special examiners appointed for that purpose by the directors of the company is disapproved.

The practice in respect of the audit of several Nidhis, the auditor not doing verification of the assets himself but relying upon the verification done by special examiners appointed by the company itself has to be condemned.

1. 1955 M.W.N. (Cr.) 114. 2. A.I.R. 1958 Mad. 151.

*R.C. No. 3 of 1959. 30th July, 1959. (8th Sravana 1881-Saka).

Controller of Insurance v. *H. C. Das*, A.I.R. 1957 Cal. 387 and R.C. No. 56 of 1956 (Madras High Court) referred.

Case referred to the High Court under section 21 of the Chartered Accountants Act and in the matter of V. Rajaram of Messrs. V. Rajaram & Co., Chartered Accountants, 50, Thambu Chetty Street, Madras-1.

R. Ramamurthi Ayyar, Advocate, for the referring authority.

S. Swaminathan and *T. V. Viswanatha Ayyar*, for Respondent.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This is a reference to us under section 21 (2) of the Chartered Accountants Act on the report of the Disciplinary Committee of the Council of the Institute of Chartered Accountants of India in proceedings taken against the respondent-auditor on a complaint preferred by the Central Government in the following circumstances. The respondent is a member of a firm of Chartered Accountants in Madras, who are appointed auditors of the Adambakkam Janopakara Saswatha Nidhi Ltd., carrying on business in Alandur. The audit related to the period ending 31st March, 1957. The actual audit was done by V. Rajaram, the respondent, a partner of the audit firm. In the audit report by the respondent, dated 31st May, 1957, we find the following statement:

> "We have not verified the securities and documents relating to the Book Debts, but have accepted the report of the Special Examiners who were appointed for the purpose by the Directors."

To understand this it is necessary to refer to Article 103 of the Articles of Association of the Nidhi. That runs as follows:

> "The Secretary shall appoint every year two persons either from the Directors or from the Members to examine the title-deeds, documents and other records in respect of immovable properties mortgaged and jewels and cash balances in possession of the Nidhi and to inspect the properties, and the said examiners shall inspect the properties personally and make a report thereon within one month preceding the Annual General Meeting of the Nidhi. . . . ."

The charge against the respondent was that he had failed to discharge one of the important duties of an auditor, namely, the verification of the assets of the Company. It was not sufficient for the auditor merely to verify the correctness of the balance-sheet as shown by the books; he should verify by actual inspection or by other evidence at his disposal the existence of the assets. It was not enough for the auditor to make the qualified report in the manner above-mentioned. The respondent was, therefore, guilty of gross negligence in the discharge of his professional duties within the meaning of clause (1) of the Schedule to the Chartered Accountants Act. So ran the complaint.

The respondent submitted that he had accepted the report of the special examiners appointed by the Board of Directors in accordance with Article 103 cited above and that he had clearly stated in the report that he had not himself verified the securities and the documents relating to the book-debts. He submitted that in doing so he was only acting in accordance with the practice prevalent in the matter of audit of such institutions, that is, Nidhis, and was under a *bona fide* belief that in view of Article 103 of the Articles of Association of the Company, he was entitled to rely upon the certificates of the special examiners in the matter of the verification of the securities. The respondent pleaded, therefore, that he had acted with reasonable care and diligence and he was not guilty of any misconduct under clause (*q*) of the Schedule to the Act.

The Disciplinary Committee of the Council held that the fact that the Company had provided for internal check for the purpose of verifying the securities would not absolve the auditor from doing what was undoubtedly one of his duties, namely, to himself verify the securities. The Committee was unable to find a universal prac-

tice of the auditor placing reliance on the report of the special examiners appointed by the company, but was willing to accept that there were instances in which that practice was being followed. The Committee was, however, clear on this point namely, that even if such practice was in vogue, it was not a correct practice, and the duty of an auditor in regard to the verification of assets, which is an onerous duty, cannot be deemed to be sufficiently discharged by not doing that duty, so to say, and by relying on the report of any person or persons appointed by the company itself to conduct an internal check. The Committee concluded thus :

" . . . . . this practice followed by some of the auditors in the case of Nidhis, of not doing the verification of the securities themselves, but of relying upon the verification done by special examiners, is a wholly improper practice, and it must be discontinued forthwith. This practice is not in conformity with the audit procedure and responsibilities of an auditor."

We have heard Mr. R. Ramamurthy Ayyar, learned counsel for the Institute of Chartered Accountants, and the learned counsel for the respondent auditor and we are happy to say that both were agreed on what should be the duty of an auditor. That is that he should himself verify the assets of the company of which he had been appointed auditor.

Mr. Swaminathan, learned counsel for the respondent, drew our attention to passages in one of the leading text-books, Spicer and Pegler's ' Practical Auditing ' which dealt with internal audit and the relationship between the internal auditor and a statutory auditor. At page 25 of the 12th edition of this book the following passage occurs and Mr. Swamination placed reliance on it :

" There also exists considerable scope for mutual assistance between the two auditors in the planning of their respective audits. Where the statutory auditor is satisfied that the internal auditor has adequately covered part of the work which the statutory auditor would otherwise do, he may be able to reduce the extent of his examination of detail ; and consultation between the two auditors may enable the internal auditor to refrain from carrying out work which he would otherwise do but which, having regard to the examination which the statutory auditor considers he must make in any event would result in duplication ".

This passage must be understood in the proper context by the distinction which the learned authors themselves make between internal check and internal audit. The internal check is most often carried out by the employees or directors of the company and it consists in checking the day-to-day transactions which operate continuously as part of the routine system. The internal audit is conducted by a qualified auditor ; only, these auditors are generally in the employment of the company. They are not independent auditors. Indeed the learned authors pointed out that one of the duties of an internal auditor would be to see how far the system of internal check is operating satisfactorily. It is also pointed out that even when there is an internal auditor, it is for the statutory or independent auditor to decide whether and to what extent he can rely on the work of the internal auditor in order to reduce the extent of his own examination of detail, and his decision will depend upon his judgment on the facts of each case, having regard in particular to the extent and efficiency of the internal audit, the experience and qualifications of the chief internal auditor and his staff and the character of their reports, and the authority vested in the chief internal auditor. We are not concerned in this case with the mutual relation between an internal auditor and an independent statutory auditor because it cannot be said that the special examiners appointed under Article 103 of the Articles of Association of the Company are in any sense internal auditors.

Mr. Ramamurthy Ayyar drew our attention to a passage in the 'Principles and Practice of Auditing' by J. R. Batliboy, 9th edition, in which emphasis is laid on the auditor's duty in verifying the assets. The auditor's duty in verifying the assets is two-fold.

" He must satisfy himself that they really existed at the date of the Balance Sheet and were free from any charge, and that they have been properly valued ".

In Spicer and Pegler's ' Practical Auditing ' it is pointed out that the veri-

fication of loans on security involves not only an examination of the loan account in the ledger, but also of the security lodged, in order that the auditor can satisfy himself that the loan is properly secured, and that there is a reasonable margin between the amount of the loan and the value of the security. These duties are also adverted to at length in *Controller of Insurance* v. *H. C. Das*[1], by the Calcutta High Court. Referring to verification of cash this Court had occasion to point out the duties of an auditor in R,C. No, 56 of 1951. We had there observed that the mere certificate from the Managing Agents that they had cash with them could not absolve an auditor from his duty to make the verification himself, and the method of verification which only consisted in accepting the report of the Managing Agents is against the accepted audit practice and principle.

We are in entire agreement with the observations of the Disciplinary Committee in condemning the practice which appears to exist in respect of the audit of several Nidhis, *viz.*, the auditor not doing verification of securities himself but relying upon the verification done by special examiners appointed by the company itself. It follows that we disapprove of the conduct of the respondent auditor in certifying that he had himself not verified the securities and documents relating to the book debts but had accepted the report of the special examiners who had been appointed for the purpose by the Directors.

Obviously there is no question of *mala fides* in this case. There is evidence that a practice did exists in regard to some of the Nidhis at any rate of accepting the report of the special examiners. It is not suggested that there was any collusion between the auditor and the Directors of the Company. In these circumstances, apart from expressing our disapproval, we do not think that the case calls for the award of any punishment as such to the respondent auditor.

V.S. ——— *Orders accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

South Arcot Electricity Distribution Co., by Director in-charge V. N. Krishnaswami .. *Petitioner**

v.

Elumalai and others .. *Respondents.*

Industrial Disputes Act (XIV of 1947), section 33-C—Scope of—Jurisdiction of Labour Court or Industrial Tribunal under to determine the amount due to workman.

Before section 33-C (1) of the Industrial Disputes Act can take effect the money claimed by a workman must be due *i.e.*, it must have become payable. And no money can be said to be due or payable before the amount of it is ascertained. Hence sub-section (2) of the section refers to a stage anterior to that provided for in sub-section (1). The distinction between the two is while sub-section (2) provides for the determination of the amount due sub-section (1) provides for collection of the amount so determined. A Labour Court has jurisdiction to entertain a petition by the workmen to determine the quantum of compensation or any other amount due to them. All that is excluded from the scope of sub-section (2) are benefits which are not capable of being computed in terms of money.

Petitions under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed in W.P. No. 820 of 1958, the High Court will be pleased to issue a writ of prohibition prohibiting the 4th respondent herein from enquiring into the petitions C.P. Nos. 76, 121, 703, 729, 330, 213 and 681 of 1957.

K. Rajah Ayyar, M. Ranganatha Sastri and *S. Bhaskaran,* for Petitioner in all the petitions.

S. Mohan Kumaramangalam, for 1st Respondent in W.P. No. 820 of 1958.

R. Ramasubbu Iyer, R. Gopalan, A. D. Sitharaman and *B. R. Dolia,* for the 1st Respondent in W.P. Nos. 842 to 847 of 1958.

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1. A.I.R. 1957 Cal. 387.

* W.P. Nos. 820 and 842 to 847 of 1958. 5th March, 1959. (14th Phalguna 1880 Saka).

T. Venkatadri, for the 2nd Respondent in W.P. Nos. 820 and 842 to 847 of 1958.

The Additional Government Pleader (*K. Veeraswami*), for Respondents 3 and 4 in W.P. Nos. 820 and 842 to 847 of 1958.

The Court made the following

ORDER.—The questions for determination in all these writ petitions are the same, and, I shall, therefore, deal with them together.

With effect from 1st June, 1957, the Government of Madras took over the undertaking of the South Arcot Electricity Distribution Company Ltd. They did so in exercise of the powers conferred on them by Madras Act (XXIX of 1954). One consequence of this taking over was that by virtue of section 6 of the Act all the properties of the company and all its rights, liabilities and obligations as on the vesting date, subject to certain provisos, vested in the Government. Some time after they took over the undertaking the Government transferred it to the Madras State Electricity Board. The taking over of the undertaking of the Company by the Government had another consequence which was probably not anticipated. Section 25-FF of the Industrial Disputes Act as it stood in 1956, that is to say, before it was amended by Central Act XVIII of 1957, provided that no workman would be entitled to compensation by reason merely of the fact that there had been a change of employers in any case where the ownership or management of the undertaking in which he was employed was transferred, whether by agreement or by operation of law from one employer to another, provided certain conditions referred to later on in the section were satisfied. Central Act XVIII of 1957 recast the section and provides in positive terms that where the ownership or management of an undertaking is transferred, whether by agreement or by operation of law, from one employer to another, every workman who had a continuous service of not less than one year shall be entitled to notice and compensation as if he had been retrenched, unless certain conditions are satisfied. A large number of the employees of the undertaking which the Government took over from the South Arcot Electricity Distribution Company, Limited considered that they were entitled to retrenchment compensation and certain other benefits referred to in section 25 of the Industrial Disputes Act, and to enforce their claims they filed petitions before the Labour Court, Madras. To these proceedings the South Arcot Electricity Distribution Company Ltd., the State of Madras and the Madras State Electricity Board were made parties.

Before the Labour Court the Company, the Government and the Electricity Board took the preliminary objection that the Labour Court had no jurisdiction to enquire into the claims. By an order pronounced on 3rd October, 1958, the Labour Court overruled the objection and posted the petitions for further enquiry. The present writ petitions have been filed to quash this order of the Labour Court.

A substantial portion of the arguments before me turned on the scope, design and purposes of section 33-C of the Industrial Disputes Act, and, it will therefore be convenient if I were to set it out in full.

" *Section 33-C. Recovery of money due from n employer.*—(1) Where any money is due to a workman from an employer under a settlement or an award or under the provisions of Chapter V-A, the workman may, without prejudice to any other mode of recovery, make an application to the appropriate Government for the recovery of the money due to him, and if the appropriate Government is satisfied that any money is so due, it shall issue a certificate for that amount to the Collector who shall proceed to recover the same in the same manner as an arrear of land revenue.

(2) Where any workman is entitled to receive from the employer any benefit which is capable of being computed in terms of money, the amount at which such benefit should be computed may, subject to any rules that may be made under this Act, be determined by such Labour Court as may be specified in this behalf by the appropriate Government, and the amount so determined may be recovered as provided for in sub-section (1).

(3) For the purposes of computing the money value of a benefit, the Labour Court may, if it so thinks fit, appoint a Commissioner who shall, after taking such evidence as may be necessary, submit a report to the Labour Court and the Labour Court shall determine the amount after considering the report of the Commissioner and other circumstances of the case."

The arguments of Mr. Rajah Ayyar, the learned advocate for the company, so far as they related to this section, may be thus summarised. The benefits which

a workman or employee is entitled to, may be placed in two broad categories, monetary benefits and non-monetary benefits. Into the former category would fall claims like those relating to arrears of pay, differences between scales of pay and the like. Into the latter category would fall claims relating to, or arising out of say, sickness, injuries suffered during the course of the employment, loss of various facilities and conveniences and the like. Sub-section (1) of section 33-C applies to monetary benefits. Sub-section (2) of section 33-C applies to non-monetary benefits. The claims made in the present case are wages for the period of the notice to which the petitioners say they are entitled, and compensation computed at the rate of fifteen days' average pay for every year of completed service. These are monetary benefits and therefore fall within the scope of the first sub-section and not of the second sub-section of section 33-C. The Labour Court has, therefore, no jurisdiction in the matter.

If it be replied that sub-section (1) of section 33-C does not contemplate any enquiry by Government then such a reply must be held to be unsound because in *Behariji Mills* v. *State*[1], it was held by the Patna High Court :

> " The newly inserted section 33-C (1) expressly grants power to the appropriate Government to make an enquiry about the legal liability of the employer to pay compensation under any provisions of Chapter V-A ".

Mr. Rajah Ayyar also referred to the decision of the Supreme Court in *S. S. Shetty* v. *Bharat Nidhi Ltd.*[2], where their Lordships had to consider the scope of section 20 of the Industrial Disputes (Appellate Tribunal) Act, 1950, the language of which is substantially similar to the language of section 33-C (1) and (2). On page 17 the following observations appear :

> " Any money which is due from an employer under the award can by virtue of the provisions of section 20 (1) of the Act be recovered by the appropriate Government on an application made to it by the workman. Where however any benefit which is not expressed in terms of money is awarded to the workman under the terms of the award it will be necessary to compute in terms of money the value of that benefit before the workman can ask the appropriate Government to help him in such recovery. Section 20, sub-section (2) provides for the computation in terms of money of the value of such benefit and the amount at which such benefit should be computed is to be determined by the Industrial Tribunal to which reference would be made by the appropriate Government for the purpose ".

In respect of this decision it is enough to say that their Lordships did not decide that only claims relating to benefits which are non-monetary in character can be investigated under section 20 (2). What they said was that when a computation has to be made, it has to be done under section 20 (2), and these observations would apply with equal force both to benefits which are monetary in character and to benefits which are non-monetary in character.

So far as the observations of the Patna High Court are concerned, with respect I find it difficult to agree. I am unable to find in section 33-C (1) words which expressly grant power to the appropriate Government to make any enquiry " about the legal liability of the employer to pay compensation under any of the provisions of Chapter V-A ".

What sub-section (1) of section 33-C provides for is this : Money may be due to a workman from an employer in pursuance of a settlement reached in the course of conciliation proceedings. Money may be due to him in pursuance of an award made by a Tribunal. Money may also be due to him for lay off and retrenchment. Now, if any money is due to a workman in respect of any of these claims, then the workman concerned is given leave to make an application to the Government for the recovery of the money due to him. Then if the appropriate Government is satisfied that the money is due, an obligation is imposed on it to issue a certificate to the Collector who would thereafter proceed to recover the money as if it were an arrear of land revenue. Before section 33-C (1) can take effect the money must be due ; that is to say it must have become payable. Obviously no money can become due or payable before the amount of it is ascertained. This sub-section therefore relates to a stage in the proceedings where the amount due to the employee

1. A.I.R. 1957 Pat. 188.
2. A.I.R. 1958 S.C. 12 : 1958 S.C.J. 187 : 1958 M.L.J. (Cr.) 92.

or workman has been quantified and determined. No doubt the appropriate Government has to be satisfied that the money is due to the workman. But then, this sub-section does not say that the satisfaction is to be reached as a result of any enquiry conducted by the Government itself. If on the documents produced before it the Government is satisfied that the money is due, it can take action. If I may use an analogy drawn from civil proceedings, the position of the Government at this stage would be that of an executing Court. The amount due to the workman must have been determined previously. The only questions that Government could investigate at this stage would be questions arising from pleas like payment or satisfaction. Sub-section (2) of section 33-C however refers to a stage anterior to that provided for in section 33-C (1). Again, to borrow the analogy from civil proceedings, the stage referred to here is the stage of enquiry or trial at the end of which alone would it be possible to say whether any sum is due to a workman and if so how much. Under sub-section (2) when any workman claims that any money is due to him the value of which can be computed in terms of money then he can go to the Labour Court and apply that the amount be determined. After the Labour Court has ascertained the amount, the workman, armed with the order of the Labour Court, may go to the Government and ask the Government to recover the money through the Collector as if it were an arrear of land revenue. The distinction between the two sub-sections is the distinction between *determination* of the amount and the *recovery* of the amount is brought out by the concluding words of sub-section (2) which runs :

> " the amount so determined may be recovered as provided for in sub-section (1) ".

These words make it fairly plain that sub-section (2) provides for the determination of the amount and sub-section (1) for the collection of the amount. All that is excluded from the scope of sub-section (2) are benefits which are not capable of being computed in terms of money.

I have already said that section 20 of the Industrial Disputes (Appellate Tribunal) Act, 1950, is in substantially similar terms to sections 33-C (1) and 33-C (2) of the Industrial Disputes Act. The question whether sub-section (2) of section 20 of that Act related only to benefits which are not monetary in character, or whether it comprehended monetary benefits also was considered by Rajagopalan, J., in *Rajamani Transport Ltd.* v. *Collector of Tiruchirapalli*[1]. The learned Judge observed :

> " The further contention was that the statutory provision (*i.e.*, section 20 (2) of the Industrial Disputes (Appellate Tribunal) Act necessarily implied only evaluation of a benefit other than a pecuniary benefit to which a worker was entitled under the terms of the award. I am unable to accept such a restricted construction of the language of section 20 (2). The section speaks of " computation" and not merely of a commutation of a benefit, commutation might imply that it was a benefit other than a pecuniary benefit that was contemplated. The expression "benefit" in section 20 (2) of the Act is, in my opinion, wide enough to include within its ambit any benefit which has accrued to the worker under the terms of a valid and enforceable award."

With this conclusion I am in respectful agreement. I would at this stage refer to the decision of the Supreme Court in *Kasthuri and Sons* v. *Salivateswaran*[2]. That case arose under the Working Journalists (Conditions of Service and Miscellaneous Provisions) Act, 1955. Section 17 of that Act is, to the extent now material, similar in terms to sub-section (1) of section 33-C, and it provided :

> " Where any money is due to a newspaper employee from the employer under any of the provisions of this Act..............
>
> the newspaper employee may.........................
> make an application to the State Government for the recovery of the money due to him, and if the State Government or such authority as the State Government may specify in this behalf is satisfied that any money is so due, it shall issue a certificate........"

Dealing with that the Court observed :

> " On the other hand, the case for the petitioner is that the section provides for a procedure to recover the amount due from an employer, not for the determination of the question as to what amount

1. (1956) 1 M.L.J. 226.
2. (1958) 2 M.L.J. (S.C.) 130 : (1958) 2 An. W.R. (S.C.) 130 : (1958) M.L.J. (Crl.) 635 : (1958) S.C.J. 844 : A.I.R. 1958 S.C. 507 (S.C.).

is due. The condition precedent for the application of section 17 is a prior determination by a competent authority or the Court of the amount due to the employee from his employer. It is only if and after the amount due to the employee has been duly determined that the stage is reached of recovering that amount and it is at this stage that the employee is given the additional advantage provided by section 17 without prejudice to any other mode of recovery available to him. According to this view, the State Government or the authority specified by the State Government has to hold a summary enquiry on a very narrow and limited point : Is the amount which was found due to the employee still due when the employee makes an application under section 17, or has any amount been paid, and, if yes, how much still remains to be paid ? It is only a limited enquiry of this type which is contemplated by section 17. Within the scope of the enquiry permitted by this section are not included the examination and decision of the merits of the claim made by the employee. When the section refers to the application made by the employee for the recovery of the money due to him, it really contemplates the stage of execution which follows the passing of the decree or the making of an award or order by an appropriate Court or authority. In our opinion, the construction suggested by the petitioner should be accepted because we feel that this construction is more reasonable and more consistent with the scheme of the Act."

Mr. Rajah Ayyar finally referred to sub-section (3) of section 33-C which empowers the Labour Court, if it thinks fit, to appoint a Commissioner for the purpose of computing the money value of a benefit claimed by an employee. This provision said Mr. Rajah Ayyar, suggests that the scope of section 33-C (2) is limited to non-monetary benefits. I am unable to agree. The existence of this provision only shows that under section 33-C (2), the Labour Court may be called upon to investigate non-monetary benefits also. It does not suggest that only claims to monetary benefits can be investigated under this sub-section. As I said before, the line of division between sections 33-C (1) and 33-C (2) would be analogous to that between execution proceedings and trial proceedings. Under section 33-C (2) the amount due has to be determined and under section 33-C (1) the amount so determined, may be recovered.

Mr. Rajah Ayyar also referred to the decision of Rajagopala Ayyangar, J., in *C. B. R. Ratnam and Co.* v. *Ekambaram*[1]. I do not think that this case helps the contention of Mr. Rajah Ayyar at all. There the learned Judge was dealing with section 25-I of the Act which enabled money due from an employer to be recovered as an arrear of land revenue by the appropriate Government on an application made to it by the person entitled to the money. That section has been repealed. The learned Judge then commented on the absence in the Act :

" of any machinery for determining the questions which would obviously arise in cases of dispute ; (i) was the workman who makes the claim ' retrenched ' so as to give rise to the statutory liability : (ii) the determination of the facts which underlie the computation of the amount of compensation under section 25-F (*b*). There might be disputes between the employer and the workman as regards both these matters."

This omission the Legislature apparently sought to make good by introducing section 35-C in 1956.

Mr. Rajah Ayyar next put forward an argument in alternative. He pointed out that section 33-C (2) begins :

" Where any workman is *entitled* to receive from the employer any benefit, etc."

and he said that the use of the word " entitled " indicates that the sub-section relates to the stage when the *title* of the workman to receive the money has been already established. Where there is a controversy about the claim of the workman some competent authority must have decided that his claim is good. It is only thereafter that the Labour Court can proceed to determine *how much* the amount due is. This construction which Mr. Rajah Ayyar invited me to put on the section would produce some very surprising results. If a workman for instance were to claim retrenchment compensation and his claims were to be disputed then only two courses would be open to him to recover his money. He must persuade the other employees to take up his cause and raise an industrial dispute, and, after such a dispute is raised, the Government must be moved to refer the dispute to the appropriate Labour Court or Tribunal. Alternatively he must go to a regular civil Court and file a suit. If an industrial dispute is raised and the matter is referred to the

1. (1957) 1 M.L.J. 175.

appropriate Labour Court or Tribunal, then that Court or Tribunal could determine how much money is payable to the workman, and, there would be no need to refer the issue back to the labour Court under section 33-C (2). Again, if the workman has got to go to a civil Court that Court can also determine the amount of compensation due to the workman assuming of course that he is entitled to compensation. The argument of Mr. Rajah Ayyar would require that after having obtained a decision from the civil Court to the effect that he is entitled to compensation the workman must go to the Labour Court and ask that Court to determine how much the amount is. Now, one purpose of the Industrial Disputes Act is to set up a special machinery which would expeditiously dispose of disputes between employers and employees and also the claims of workmen. It will be noticed that the numerous amendments made to the Act subsequent to 1947 have progressively increased the rights and facilities conferred on workman. The arguments of Mr. Rajah Ayyar would, it seems to me, run counter to the whole scheme of the Act and the various amendments incorporated in it from time to time.

The next important contention of Mr. Rajah Ayyar was along these lines. Section 7 of the Act empowers the appropriate Government to constitute one or more Labour Courts. Such Labour Courts have jurisdiction to adjudicate industrial disputes relating to matters specified in the Second Schedule to the Act. Labour Courts can also perform such other functions as may be assigned to them under the Act. Then there is section 7-A which empowers the appropriate Government to constitute one or more Industrial Tribunals. These Tribunals would have jurisdiction to decide industrial disputes whether they relate to matters specified in the Second Schedule or the Third Schedule. The point is that if a matter falls in the Third Schedule it is only the Industrial Tribunal that would have jurisdiction and not the Labour Court. If we turn to the Third Schedule we find there " retrenchment of workmen and closure of establishment " enumerated as the 10th item. So questions of retrenchment are within the exclusive jurisdiction of Industrial Tribunals. The Labour Court, which is the Court referred to in section 33-C (2) has, therefore, no jurisdiction in the matter.

It appears to me that a fallacy is involved in this reasoning. The Second and Third Schedules to the Act would become relevant and the jurisdiction connected with the matters enumerated in those schedules would spring into existence only when there is an industrial dispute. Where there is no industrial dispute at all there is no scope for referring either to the Second Schedule or to the Third Schedule. That being so, it cannot be said that the jurisdiction of the Labour Court is ousted by reason of the fact that retrenchment of workmen is referred to as the 10th item in the Third Schedule. There is no industrial dispute in the present case. Every individual workman has made his own application and, there being no industrial dispute, the Third Schedule does not come into consideration at all.

Under section 7 Labour Courts are empowered to adjudicate on matters referred to in the Second Schedule should an Industrial dispute arise in relation to any of those matters ; in addition they are given power to perform "*such other functions as may be assigned* to them under this Act ". Under section 33-C (2) the Labour Court is expressly empowered to deal with claims of the kind that have been preferred before it. This objection also fails.

The Labour Court therefore has jurisdiction to entertain the petitions filed by the workmen.

One thing, however, I must make clear. As I understand their case to be, the position of the Government and of the Electricity Board at this stage is that they are not bound to pay to the workmen any sum in pursuance of their present claims and that even if it be found that the South Arcot Electricity Distribution Company is bound to do so, they would not be liable to make good the amount of such payments to the company. On the other hand, the case of the company is not merely that they are not bound to pay these amounts to the workmen, but that in case it is eventually held that they are bound to pay them by virtue of section 6 of Madras Act XXIX of 1954 that liability would fasten on the Government. The disputes between the Company and the Government *inter se* would not be within the juris-

diction of the Labour Court. That controversy will have to be disposed of outside the Industrial Disputes Act.

In the result, these petitions are dismissed but without costs.

R.M. ——— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

Sambasiva Chetty .. *Appellant**

v.

Mannankatti .. *Respondent.*

Workmen's Compensation Act (VIII of 1923), section 30—Appeal by employer without certificate of deposit granted by the Commissioner—Presentation incompetent—Section 2 (e) and (n)—Construction of building for letting out to tenants—' Employer '—Employment of, workman through a maistry—Employee is a ' workman '.

The presentation of an appeal by the appellant-employer without the requisite certificate given by the Commissioner under the Act to the effect that the appellant had deposited the amount payable under the order appealed against, would render the presentation itself incompetent.

The Proviso to section 30 refers to an employer who files an appeal. That would include an employer who contended before the Commissioner that he was not an 'employer' but was held to be one by that authority.

Where the construction of building had been going on for quite a long time and on all the days on which there was work the deceased was employed though only as a cooly it cannot be said that the deceased was only employed casually.

Where the employer had more than one house and he was constructing the house only with a view to let it out to the tenants, it should be held that the workman was employed in the course of the employer's business.

Even though an employer may employ workmen through the agency of a maistry the employee would be workman within the meaning of section 2 (*n*) of the Act.

Case-law discussed.

Appeal against the Order of the Court of the Additional Commissioner for Workmen's Compensation at Madras, dated 29th July, 1958 and made in W.C. Case No. 299 of 1957.

P. Muthukumaraswamy Mudaliar and *P. Venkatachalapathi*, for Appellant.

B. Punyakoti Chetty and *T. S. Sundaram*, for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal against an order under section 30 of the Workmen's Compensation Act (which would be referred to hereafterwards as the Act) of the Commissioner for Workmen's Compensation, Madras, awarding compensation to the respondent for the fatal injury sustained by his wife, Vellachi, in the course of her employment. The employer is the appellant. The deceased was one of the coolies employed in the construction of a house by the appellant. The construction of the building began several months previous to the accident and by June, 1957, the ground floor had been completed and a terrace was in the process of being put up. On the 17th June, 1956, the work on the terrace was proceeding. The deceased Vellachi was engaged in bringing water for mixing up the jelly for the construction. It is now found that the place where the jelly was being mixed up was just about a foot away from the unprotected edge of the terrace. The deceased after pouring water on the jelly evidently turned back, slipped and fell down a height of 20 feet. Death followed instantaneously. The respondent the husband of the deceased, who was himself a disabled person, applied to the Commissioner, Workmen's Compensation under section 30 of the Act for compensation on the footing that he was a dependent on the deceased.

The claim was contested by the employer on several grounds. The Commissioner held that the deceased was a workman within the meaning of the Act, that

* A.A.O. No. 326 of 1958.   3rd April, 1959.
(13th Chaitra, 1881 Saka).

the jelly was mixed near the edge of the first floor of the building, that the deceased sustained the injury in the course of her employment which was not of a casual nature and awarded a compensation to the respondent in a sum of Rs. 900.

The employer thereupon filed this appeal under section 30 of the Act against the order awarding compensation. The appeal was filed in this Court on 1st October, 1958. The memorandum of appeal was not accompanied by a certificate by the Commissioner to the effect that the appellant had deposited with him the amount payable under the order appealed against. This is required to be done under the Proviso to section 30 of the Act. This defect was pointed out by the Office of the Registrar when the papers were returned to the advocate for the appellant on 31st October, 1958. The advocate for the appellant re-presented the appeal on 3rd November, 1958 and so far as the requisition referred to above was concerned he stated thus :

"As and when this appeal is passed and about to be posted, this will be complied and receipt produced."

The Officer did not accept this to be sufficient compliance of its previous return and made a fresh return of the papers. Thereupon the employer made the deposit with the Commissioner on 10th December, 1958, obtained a certificate to that effect and enclosed the same in the appeal memorandum and re-presented the appeal. It must be stated that if the appeal were deemed to be filed on 10th December, 1958, it would be barred by limitation.

Mr. Punyakoti Chetty the learned advocate for the respondent has taken a preliminary objection as to the maintainability of the appeal on the ground that the original presentation was incompetent and that even if this appeal is deemed to have been presented on 12th October, 1958, it should be held to be barred by limitation.

It is, therefore, necessary to consider whether an appeal under section 30 of the Act not accompanied by the deposit required under the Proviso to that section could be deemed to have been validly presented. Section 30 (1) states :

" An appeal shall lie to the High Court from the following orders of a Commissioner, namely :

(a) an order awarding as compensation a lump sum whether by way of redemption of a half-monthly payment or otherwise or disallowing a claim in full or in part for a lump sum :

Provided that no appeal shall lie unless the memorandum of appeal is accompanied by a certificate by the Commissioner to the effect that the appellant has deposited with him the amount payable under the order appealed against."

The terms of the Proviso prohibit the appeal and it is in a mandatory form. The presentation of the appeal without the requisite deposit with the Commissioner of the amount awarded would render the presentation itself incompetent. It was observed by Sarjoo Prasad, J., in *Ramnivas* v. *Mariam*[1], at page 262 :

"It is doubtful whether when an appeal has been filed within the period of limitation allowed by law it would be time barred merely because it is not accompanied by a certificate by the Commissioner to the effect that the appellant has deposited with him the amount payable under the order appealed against. It says that no appeal by an employer shall lie unless a certificate is given. In other words if the certificate is not produced at some stage before the hearing of the appeal the appeal will not be entertained."

The learned Judges however did not rest their conclusion in that case on this question as they were of opinion that there was sufficient ground for condoning the delay in filing the certificate. The question however came up for consideration in *Bhurangya Coal Co.* v. *Sahebjan*[2]. It was held in that case that the Proviso to section 30 (1) of the Act on its true construction required that the certificate should be filed along with the memorandum of appeal as an essential part thereof and that an appeal as contemplated by it could not be said in law to be an appeal unless it was accompanied with the aforesaid certificate of the Commissioner. The learned Judges held that the filing of a memorandum of appeal could not by itself amount in law to a formal presentation of an appeal unless the memorandum of appeal was

1. A.I.R. 1951 Pat. 260. 2. A.I.R. 1956 Pat. 299.

accompanied with the certificate referred to in the Proviso. I am of opinion that the decision of the Bench referred to above is in conformity with the terms of the section to which I made reference. By way of an analogy I may refer to the provisions of section 69 of the Partnership Act. There the registration of a firm is a condition precedent to a right to institute a suit and it has been held that a Court would have no jurisdiction to proceed with the trial of the suit when the conditions precedent have not been fulfilled. In *Ponnuchami* v. *Muthuswami*[1], a suit was filed by the members of an unregistered firm. Subsequent to the institution of the suit the firm was registered. The question arose whether the subsequent registration could remedy the initial incompetence of the suit. The learned Judges held that the registration of the firm was a condition precedent to the right to institute a suit and that the Court had no jurisdiction to proceed with the trial of the suit when the condition precedent had not been fulfilled and that the subsequent registration of the firm would not put the suit on a proper basis. I may, however, refer in this connection to the decision in *Ramakrishna Nadar* v. *Ponnayya Thirumalai Vandaya Thevar*[2]. In that case the plaintiff first applied for leave to sue *in forma pauperis* but that application was dismissed with costs of the respondent thereto. The plaintiff thereupon instituted a suit after paying Court-fee but he failed to pay the costs of the pauper petition to the defendant first before the institution of the suit but paid it only subsequent to the institution.

Order 33, rule 15 of the Civil Procedure Code, states thus :

> " An order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue ; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided that he first pays the costs (if any) incurred by the State Government and by the opposite party in opposing his application for leave to sue as a pauper."

It was contended in that case that as the costs directed on the pauper application was not paid before the institution of the suit, the suit could not be maintained. The learned Judges held that the suit although not properly presented on the date of its presentation by reason of the fact that the condition precedent had not been complied with, it should be deemed to have been presented on the date when the costs were actually paid. Applying that principle it could be held in the present case that the appeal could be deemed to be properly presented only on 12th October, 1958. By that date, however, the time limited by section 30 for filing the appeal had expired. There is no application before me for excusing the delay in the presentation of the appeal. In the circumstances, I have no alternative but to dismiss the appeal as incompetent.

Mr. Muthukumaraswamy contended that the appellant was not an employer and so restriction as to the right of appeal contained under section 30 would not apply to him and that the appellant would be entitled to present the appeal even without making the deposit. I have already referred to the provision of section 30. That no doubt says that in the case of an appeal by an employer under that section there should be a certificate by the Commissioner that the amount awarded under the order appealed against was deposited with him. The term " employer " has no doubt been defined under the Act. The contention of the learned advocate is that as the appellant would not come within the definition of the term employer the deposit could not be insisted upon him. I am unable to accept that argument. The Proviso to section 30 refers to an employer who files an appeal. That would include an employer who contended before the Commissioner that he was not an employer but was held to be one by that authority.

Even assuming that the appeal is maintainable, I am not satisfied that the appellant has any case on the merits. The contention of the learned advocate for the appellant is that the deceased was not a workman within the meaning of the Act because she was (1) a casual worker and (2) she was not employed in connection with the employer's trade or business. The term " workman " has been defined

1. (1941) 2 M.L.J. 968 I.L.R. (1942) Mad. 355.
2. (1935) 69 M.L.J. 791.

in the Act under section 2, sub clause (*n*). So far as the portion material for this case is concerned it runs as follows :

" ' Workman ' means any person (other than a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business) who is

(ii) employed on monthly wages not exceeding four hundred rupees, in any such capacity as is specified in Schedule II............"

From the above it is clear that two conditions should be satisfied before a person who would otherwise be a workman could be excluded from the definition, *viz.*, (1) the employment must not be casual and (2) he must be employed in connection with the trade or business of the employer. In *Periyakkal* v. *Agent, S.I.Ry. Co., Ltd., Trichy*[1], Curgenven and King, JJ., held that a person in order to be excluded from the definition of workman under section 2 (*n*) of the Workmen's Compensation Act must not only be employed as of a casual nature but also one who is employed otherwise than for the purpose of the employer's trade or business and that both the classifications should be present together.

As regards the first contention urged by the learned advocate for the appellant the finding of the Commissioner is that Vellachi was not a casual labourer. As I stated above the building operation had been going on for quite a long time for a period of more than seven months. It is also found that work in the building was going on regularly though with occasional breaks for five or six days due to shortage of material and that on all the days on which there was work in the building the deceased was employed though only as a cooly or a *chital*. In the circumstances, I cannot agree with the contention of the learned advocate for the appellant that the deceased was only employed casually.

The second contention of the learned advocate for appellant is that the employer has no business in constructing houses, and that, therefore, it could not be held that the deceased would come within the definition of the term workman. I am not able to accept this contention either. It is admitted that the appellant has more than one house and he was building the house only with a view to let it out to tenants. I am of opinion that in such circumstances it should be held that the workman was employed in the course of the employer's business.

The next contention of the learned advocate for the appellant is that the latter was not an employer within the definition of the term under section 2 (*e*) of the Act. Section 2 (*e*) does not in terms define the term "employer" but includes certain persons who would not otherwise become employers. The contention is that the deceased was employed by a maistry and there was no privity of contract between the appellant and the deceased as such. According to the appellant it was the maistry who took the wages from the employer and distributed it amongst the workmen. It was, therefore, contended that the deceased should be deemed to be employed under the maistry and not under the appellant. Building operations are generally done through a maistry, who recruits the labourers and in a way controls their work. But that would not make the maistry the employer. In the present case it is admitted that the brother-in-law of the employer supervised the construction of the building. Under these circumstances I am of opinion that the appellant would be an employer within the meaning of section 2 (*e*). In *Armugham* v. *Nagammal*[2], it was held that in a case where a workman was employed by a maistry on behalf of the employer, the former would become a workman within the meaning of section 2 (*n*) of the Act and would be entitled to claim compensation in respect of an accident sustained in the course of the employment. I agree with Mack, J., that even though an employer may employ workmen through an agency of a maistry the employee would be a workman within the meaning of section 2 (*n*) of the Act. I am therefore of opinion that the Commissioner for Workmen's Compensation was within his jurisdiction in entertaining the claim and making an order for compensation. No further point has been argued before me. The appeal, therefore, fails and is dismissed with costs.

V.S. ——— *Appeal dismissed.*

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1. (1935) 69 M.L.J. 93 : I.L.R. 58 Mad. 804.
2. (1948) 2 M.L.J. 639 : A.I.R. 1949 Mad. 462.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE GANAPATIA PILLAI.

O. R. M. M. S. P. S. V. Meyyappa Chettiar by his power-of-attorney agent V. Edaganathan Pillai .. *Appellant**

v.

Messrs. Murugappa and Sons and others .. *Respondents.*

Transfer of Property Act (IV of 1882), section 82—Scope of—Contribution—Principle of.

Section 82 of the Transfer of Property Act proceeds on the basic principle of the unity of the mortgage debt. The principle of contribution comes into existence only with reference to the liability of the property which has borne the burden of more than one mortgage debt. The first part of the section deals with a case of a mortgage over the property owned by two or more persons in distinct and separate rights. The second part deals with a case where, out of two separate properties belonging to the same owner, one is mortgaged to secure one debt and subsequently both are mortgaged to secure another debt. The property which is subject to both the debts is held liable to contribute rateably to the second debt only after deducting the amount of the former debt from the value of the property out of which it has been paid. In both cases the right of contribution is available only against persons who stand in the position of co-mortgagors or their successors-in-interest or against the same property subject to two different mortgages. Apart from the statutory provisions a claim for contribution can be founded on the principles of a common burden shared by many people, but discharged by one, with the result that the remaining sharers enjoyed the benefit of the discharge. This principle of law applies in many situations as between co-sharers or co-tenants, partners, co-owners, co-parceners and so on. The basis of contribution in all such cases is not only the common ownership of property but also a common liability which was discharged by one.

Appeal against the Decree of the Court of the Subordinate Judge of Tanjore and passed in O.S. Nos. 14, 22 and 21 of 1949 respectively.

R. Gopalaswami Ayyangar, for Appellant.

T. Venkatadri, E. A. Viswanathan, C. Sundaram and *K. Parasurama Ayyar,* for Respondents.

The Judgment of the Court was delivered by

Ganapatia Pillai, J.—These three appeals arise out of a common judgment of the Subordinate Judge of Tanjore in the following six suits : O.S. Nos. 14, 15, 16, 21, 22 and 24 of 1949. All the suits were for contribution, and, in the alternative, for partition, against defendants 1 to 17 in those suits, who are the successors-in-interest of one AL.AR. Arunachalam Chettiar. Some other defendants were also impleaded in all these suits, but as against them, no relief of contribution was claimed. The alternative claim for partition of the properties was given up in the lower Court and is not in issue now. The appellant in A.S. No. 150 of 1952 is the plaintiff in O.S. No. 14 of 1949. The appellant in A.S. No. 151 of 1952 is the plaintiff in O.S. No. 22 of 1949, and the appellants in A.S. No. 580 of 1955 which was originally filed in the District Court, West Tanjore, but subsequently transferred to this Court are the plaintiffs in O.S. No. 21 of 1949.

All the suits related to a common claim by the different plaintiffs. The claim arose under the following circumstances. On the death of the last Rani of the Tanjore Raj, there were several claimants to the properties she left and the receiver in possession of the properties filed an inter-pleader suit which was ultimately numbered as O.S. No. 3 of 1919 on the file of the District Court, West Tanjore. By the preliminary decree in that suit passed on 1st July, 1918, defendants 1 and 2 therein, sons of the adopted son of the late Raja of Tanjore, were declared entitled to a one-fourth share, and defendants 4 to 11 in that litigation, known compendiously as Mangala Vilas defendants, were declared entitled to the remaining three-fourth share. During the pendency of the appeal against this preliminary decree in the High Court, the successful claimants in the lower Court were allowed to withdraw from Court monies collected and deposited by the receiver in possession.

* Appeals Nos. 150 and 151 of 1952 and 580 of 1955. 7th April, 1959. (17th Chaitra, 1881—Saka.)

On 29th January, 1923, that is, even before the appeal against the preliminary decree was disposed of in the High Court, AL.AR. Arunachalam Chettiar purchased a half share of the properties allottable to defendants 8, 9, 11, 25 and 26 in that suit. Soon after the purchase, Arunachalam Chettiar got himself impleaded as defendant 31 in the suit. The High Court modified the preliminary decree of the lower Court on 21st February, 1924, by reducing the share of the Mangala Vilas defendants from three-fourth to three-seventh. In the final decree passed in the case on 27th February, 1926, a charge was created over the entire properties allotted to the Mangala Vilas defendants for repayment of the excess amount drawn by them before the preliminary decree was modified in appeal by High Court. By the same decree, for the half share of properties purchased by Arunachalam Chettiar specific items were allotted to him and they form Schedule 12 to the decree. These properties also were subject to the charge created in favour of defendants 1 and 2, who could be called the legitimate descendants of the Rajah as against Mangala Vilas branch, who constituted the illegitimate descendants of the late Rajah. Though the purchase made by Arunachalam Chettiar was made in his name, it is common ground that the funds for this purchase were provided in 25 shares by a number of people. Arunachalam Chettiar himself contributed 13¼ shares. Defendants 18 to 20 in O.S. No. 14 of 1949 contributed six shares; and the remaining shares were contributed by the plaintiffs in O.S. No. 14 of 1949, the fathers of defendant 21, of defendants 22, 23 and 26 and of defendants 24 and 25. The properties acquired by Arunachalam Chettiar could not be divided immediately, because an appeal to the Privy Council against the appellate decree was pending and it was disposed of only on 27th February, 1936. Immediately thereafter, defendant 23 in O.S. No. 14 of 1949 instituted a partition suit, O.S. No. 21 of 1936, in the Sub-Court, Tanjore, and a final decree was obtained in that suit, allotting equally to all the 25 shares all the properties acquired by Arunachalam Chettiar. But no provision was made for the discharge of the liability imposed by the final decree in the palace suit, O.S. No. 3 of 1919 for restitution of the excess amounts drawn by the Mangala Vilas defendants. The claim, in substance, in the cases with which we are now concerned, are that these plaintiffs had been forced to pay sums, by execution being levied against properties allotted to them under the partition decree in O.S. No. 21 of 1936, more than their due share of the common burden and this was sought to be recovered from those sharers who had contributed less than what they should have contributed.

The main contesting defendants were the successors-in-interest of AL.AR. Arunachalam Chettiar, who could be compendiously called AL.AR. group. Various defences were put forward and a number of issues were raised to cover those defences by the lower Court. It may not be necessary for the disposal of these appeals to refer to all those defences.

The learned Subordinate Judge held that the plaintiffs in these suits were not entitled to contribution. His reasoning for reaching this conclusion can be stated thus. The basis of contribution is not personal. It arises out of possession of property. The only statutory provision which would sustain such a claim is section 82 of the Transfer of Property Act. By the consent partition decree, even the liability to contribute based on section 82 of the Transfer of Property Act has been abolished. Therefore, every sharer, to whom property was allotted under the partition decree, must bear the burden of the restitution charge without any recourse to other sharers who got properties under that decree. The learned Subordinate Judge also found that the suit was bad for multifariousness. The respondents in this appeal did not seek to justify this finding of the learned Judge and we are unable to see any reason why the suit was bad for multifariousness. The only reason given by the learned Subordinate Judge for his conclusion upon this issue was that all the materials necessary for enabling him to work out the liability of the defendants for contribution were not before Court, and therefore he was justified in holding that the plaintiffs were not entitled to contribution. In support of this conclusion, the learned Judge relied on the Privy Council decision in *Faqir Chand* v. *Aziz Ahmed*[1]. We are unable to see

1. (1931) 62 M.L.J. 492: L.R. 59 I.A. 106 : I.L.R. 54 All. 199 (P.C.).

what relevance this decision has on the question of multifariousness. Nor are we able to agree with the learned Subordinate Judge that the materials placed before him for ascertaining the amount payable by each set of defendants were insufficient. We do not therefore agree with the trial Judge that these suits should be dismissed on this ground.

Mr. T. Venkatadri, learned counsel for the respondents, made no attempt to justify the finding of the trial Judge that the basis of the claim for contribution is the statutory provision in section 82 of the Transfer of Property Act. That section reads thus :

> "Where property subject to a mortgage belongs to two or more persons having distinct and separate rights of ownership therein, the different shares in or parts of such property owned by such persons are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, and, for the purpose of determining the rate at which each such share or part shall contribute, the value thereof shall be deemed to be its value at the date of the mortgage after deduction of the amount of any other mortgage or charge to which it may have been subject on that date.
>
> "Where, of two properties belonging to the same owner, one is mortgaged to secure one deb and then both are mortgaged to secure another debt, and the former debt is paid out of the former property, each property is, in the absence of a contract to the contrary, liable to contribute rateably to the latter debt after deducting the amount of the former debt from the value of the property out of which it has been paid."

These two paragraphs of the section deal with two instances of a claim for contribution arising under a mortgage. The first deals with a case of a mortgage over one property owned by two or more persons in distinct and separate rights. The second deals with a case where, out of two separate properties belonging to the same owner, one is mortgaged to secure one debt, and, subsequently, both are mortgaged to secure another debt. The property which is subject to both the debts is held liable to contribute rateably to the second debt only after deducting the amount of the former debt from the value of the property out of which it has been paid. In both these cases, the right of contribution is available only against persons who stand in the position of co-mortgagors or their successors-in-interest or against the same property subject to two different mortgages. But the basic principle on which this section proceeds is the unity of the mortgage debt. The first part of this section deals only with one mortgage debt over one property owned by more than one person. But the second part of the section deals with more than one mortgage debt. Here again, the principle of contribution comes into existence only with reference to the liability of the item of property which had borne the burden of more than one mortgage debt.

Applying section 82 to the facts of this case, it will be evident that, if at all, it could have been invoked only severally by defendants 8, 9, 11, 25 and 26 in the Mangala Vilas group on the basis of the restitution charge against each set of defendants as the unit. By the clause in the final decree which gave this restitution charge, no common burden was cast upon all these defendants, each one of whom or one or other of whom forming a group was made liable to pay specified sums either to the first defendant or to the second defendant, the legitimate descendants of the Rajah. All these defendants, namely, defendants 8, 9, 11, 25 and 26, could not have formed a group for the purpose of a claim of contribution based upon section 82 of the Transfer of Property Act, because, admittedly, the clause in the decree did not create a common restitution charge against these defendants on all the properties allotted to them for the amounts payable separately to defendants 1 and 2. In the first place, the amount repayable to the first defendant was a separate charge, just as the amount repayable to the second defendant was the subject of a separate charge. In respect of these two separate charges, the Mangala Vilas group of defendants were liable not together, but separately in respect of the properties allotted to them. The effect of the purchase by Arunachalam Chettiar of a half share of the properties allottable to all these defendants, namely, the Mangala Vilas group, was to convert the separate liability of these various defendants in respect of the restitution charges into a common liability, to which section 82 cannot in terms apply.

The only other statutory provisions relating to contribution are section 43 of the Indian Contract Act and section 92 of the Transfer of Property Act. For the same reasons for which section 82 has been held by us to be not applicable in terms to the liability in this case, section 92 of the Transfer of Property Act also would not apply. Section 43 of the Contract Act deals with a liability for contribution arising out of an express contract. That is not the case here. Therefore, we have got to find out the legal basis for the claim for contribution. In our opinion, apart from these statutory provisions, a claim for contribution can be made, founded on the principle of a common burden shared by many people, but discharged by one, with the result that the remaining sharers enjoyed the benefit of that discharge. This principle of law applies in many situations as between co-tenants and sharers in properties held in common like partners, coparceners and co-owners. In the case of co-tenants, Freeman, in his standard work on Co-tenancy & Partition, Second Edition, pages 321 and 322, describes this liability thus :

"The liability to contribute is the result of a general equity, founded on the quality of burthens and benefits. To establish the right of contribution, the plaintiff must show that his payment has removed a common burthen from the shoulders of himself and the defendants and that they are each benefited by it. This occurs in all cases of payments made by one surety, on the debt for which several are bound a common burthen is removed and a common benefit received. But the doctrine of contribution is not at all founded on contract : ......So too, it applies to cases where the liability does not, in any shape, arise out of a contract, as when a common property, held by purchase, descent, or devise, is liable to the payment of a sum of money, and one is compelled to pay the whole, he shall have contribution from his co-tenant......Precisely, the same right of contribution would have arisen if the parties, instead of being co-tenants, had been owners in severalty of lands embraced in and subject to the same mortgage or other lien."

The same principle is expressed thus in Lindley on Partnership, 11th edition, at pages 454-455 :—

" An agreement may undoubtedly give rise to a right to indemnity or contribution ; but the absence of an agreement giving rise to such a right is by no means fatal to its existence. The general principle which prescribes equality of burden and of benefit is amply sufficient to create a right of contribution in many cases in which it is impossible to found it upon any genuine contract, express or tacit. The common feature of such cases is that one person has sustained some loss which would have fallen upon others as well as upon himself, but which has been averted from them at his expense."

As examples, Lindley gives the following instances :

" (a) Where one tenant-in-common repairs the common property, and so saves it from destruction ;

(b) Where one of several sureties pays a debt for which all are liable ;

(c) Where one person has his goods thrown overboard in order to save the ship and the rest of its cargo."

It will be noticed that the basis of contribution in all these instances is not only the common ownership of property, but also a common liability which was discharged by one person conferring benefit upon the other persons, subject to that liability. This being, in our opinion, the true principle, the liability to contribute in this case arose by reason of the common purchase of the properties by Arunachalam Chettiar. It is true that different items of properties purchased were subject to different liabilities for restitution in favour of defendants 1 and 2 in the palace suit ; but, as amongst the 25 sharers who purchased the property, namely, the half share belonging to the Mangala Vilas group of defendants, the totality of the burden upon the various properties included in the purchase for the sums due to defendants 1 and 2 is the common burden of all the purchasers. There is no case here of any contract or agreement between the purchasers as to the distribution of this burden. Therefore the principle of equality of benefit is based upon the corollary of equality of liability. Thus, the right of contribution in this case arises by reason of the common purchase of the several properties which were subject to several burdens. Having said that there was no agreement among the common purchasers as regards the distribution of this burden at time of the purchase, we must notice that there was also no agreement among them at the time when a consent partition decree was passed in O.S. No. 21 of 1936. We have perused the Commissioner's report in this case to satisfy ourselves that the burden of the restitution charge in favour of defendants 1 and 2 existing over these properties which were partitioned, was not taken into account for effecting

the division. This circumstance, curiously enough, is stressed both by the learned trial Judge and by learned counsel for the respondents as the basis of escape from liability for contribution. In our opinion, just the reverse is the true inference.

This general principle of law, namely, equality of burden and equality of benefit as the basis of the claim for contribution has been recognised both by the Privy Council and by our Supreme Court. In *Mohammad Kazim Ali Khan* v. *Mohammad Sadiq Ali Khan*[1], the Privy Council had to deal with a claim of a sharer who had paid off the dower debt of a widow of a deceased Mohamedan. This debt was discharged from out of some of the properties of the deceased, and, when a claim for contribution was laid against all the sharers who had taken the properties of the deceased, it was upheld and the reasoning appears from the following passage :

"It is not necessary that the plaintiffs should found upon an actual or implied promise in seeking contribution from the defendants in the events which have happened. Whether or not sections 69 and 70 of the Indian Contract Act are wide enough to cover the case, the root of the plaintiffs' claim is their right to a due administration of the estate of the deceased. 'The reason given in the books is, that *in aequali jure* the law requires equality: one shall not bear the burthen in case of the rest', *Dering* v. *Earl of Winchelsea*[2]. 'The principle established in the case of *Dering* v. *Earl of Winchelsea*[2] is universal, that the right and duty of contribution is founded on doctrines of equity ; it does not depend upon contract' : *Ramskill* v. *Edwards*[3]. This has been settled law in India since *Rambux Chittangeo* v. *Modoosoodhun Paul Chowdhry*[4], a Full Bench decision of the High Court at Calcutta in Sir Barnes Peacock's time, which contains a careful exposition of the matter from an Indian standpoint."

We must now consider the contention of Mr. Venkatadri, which relates to the mode of application of the principle of contribution. His argument was that the plaintiffs in all these suits have taken the properties allotted to defendants 25 and 26 in the palace suit under the partition decree and that therefore their claim to contribution should be confined only to those persons who have taken shares along with them in the properties which belonged to defendants 25 and 26. In support of this contention, he referred us to a prior suit, O.S. No. 57 of 1947, on the file of the Subordinate Judge, Tanjore, and the Judgment of this Court on appeal therefrom. It was contended that the plaintiffs in that suit had asked for contribution only against properties allotted to defendant 11 in the palace suit and against those sharers who had taken these properties under the partition decree. We have looked into the Judgment of this Court in that appeal and we find that section 82 of the Transfer of Property Act was applied to the determination of the liability. That suit was laid by a purchaser of one item allotted to defendant 11 in the palace suit against purchasers of other properties allotted to the same defendant. It is not clear to us from the Judgment of this Court that the other sharers concerned in the purchase made by Arunachalam Chettiar were made parties to that suit. In the present batch of suits also, other sharers besides defendants 1 to 17 are made parties ; but no claim for contribution is made against them on the ground that the properties allotted to them have already borne more than their due share of the common liability. We are not able to ascertain whether in O.S. No. 57 of 1947 that was the reason for confining the claim for contribution against those sharers who had taken the properties of defendant 11 in the palace suit by reason of the partition decree. There is also one other ground of distinction between the two cases. Here, we are dealing with more than one charge, whereas, in the other suit, the right to contribution was based only upon the charge created against the properties allotted to the 11th defendant alone. Without knowing all the facts of the prior litigation, it is not possible for us to say anything more upon the nature of the claim in that litigation. Even conceding that the claim was confined to the sharers in the group to which the plaintiff in that prior suit belonged, that would be no ground for denying relief to the present plaintiffs.

Next, Mr. Venkatadri raised the question whether the properties allotted originally to the shares of defendants 8 and 9 by the final decree in the palace suit should be made liable for the claim in the present suit. His contention was that this liability had been scaled down under Madras Act IV of 1938, and, those properties or

1. (1938) 2 M.L.J. 210 (P.C.).
2. (1787) 2 Bos. 4 Pul. 270 and 1 Cox. 318 at 321 : 29 E.R. 1184.
3. (1885) L.R. 31 Ch. D. 100 at 109.
4. (1867) 7 W.R. 377 (F.B.).

the persons who had obtained those properties under the partition decree had paid up the entire amount due as scaled down against defendants 8 and 9. That question does not arise for consideration now. Though we may say that, if there was a common liability as between all the 25 sharers, the mere fact that the properties allotted to some of these sharers bore a correspondingly lesser liability than the others, would not be a circumstance to escape contribution. The allotment of these properties to those particular defendants under the partition decree was only an accident, and this, in our opinion should make no difference in the matter of contribution. We are of course aware that the entire liability is to be pooled and shared equally among all the sharers, and, if on such account-taking the sharers who have been allotted the properties which originally belonged to defendants 8 and 9 are found to have paid more than their proportionate share of the common liability, certainly, they would not be called upon to contribute. But this is not on the ground that the properties allotted to them bore a proportionately less liability than the other properties. This would be on the ground that they have already contributed more than their due share of the common liability, taking the entire amount due under the restitution charges to defendants 1 and 2 together.

We therefore reverse the finding of the learned trial Judge that no right of contribution exists in the plaintiffs who are the appellants before us. The dismissal of these suits by the trial Judge is set aside. We are unable to pass any preliminary decree for contribution straightaway, because, both the learned counsel agree that further pleadings will have to be filed and documents would have to be produced to fix the exact amount collected from each sharer and the exact amount due for the total liability in favour of defendants 1 and 2 in the palace suit. These figures can be worked out only on further pleadings being filed, and, if necessary, on further evidence being taken. We therefore remand these suits for disposal to the lower Court. Liberty is given to both parties to file further pleadings and to lead further evidence, if necessary.

The costs of these appeals will be provided for in the revised decree to be passed by the lower Court.

The Court-fee paid on the memoranda of appeal shall be refunded to the appellants.

R.M. *Appeal allowed and case remanded.*

[END OF VOLUME (1959) 2 M.L.J. REPORTS.]

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21	=	—	=	—	=	—
22	=	257	=	251	=	—
25	=	—	=	30	=	—
28	=	131	=	—	=	198
32	=	13	=	—	=	187
38	=	6	=	—	=	285
46	=	341	=	69	=	—
52	=	—	=	(1958) M.W.N. 712	=	—
53	=	71 L.W. 835	=	201	=	74
60	=	100	=	—	=	245
65	=	71 L.W. 788	=	—	=	—
71	=	—	=	—	=	12
105	=	71 L.W. 686	=	112	=	—
106	=	—	=	89	=	—
108	=	126	=	—	=	—
110	=	371	=	48	=	—
111	=	—	=	94	=	331
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122	=	71 L.W. 843	=	208	=	—
125	=	—	=	49	=	—
135	=	—	=	—	=	—
143	=	92	=	80	=	—
144	=	—	=	77	=	—
146	=	65	=	—	=	—
148	=	71 L.W. 683	=	576	=	—
149	=	129	=	—	=	—
151	=	136	=	34	=	460
153	=	—	=	91	=	281
157	=	—	=	149	=	—
160	=	71 L.W. 701	=	—	=	(1958) Mad. 1109
165	=	—	=	(1958) M.W.N. 643	=	—
167	=	—	=	—	=	—
168	=	253	=	—	=	432
171 (F.B.)	=	46	=	36	=	278
173	=	90	=	248	=	—
176	=	93	=	135	=	—
178	=	—	=	87	=	—
181	=	59	=	44	=	336
185	=	155	=	233	=	—
189	=	—	=	131	=	—
193	=	135	=	232	=	620
195	=	71 L.W. 857	=	24	=	—
201	=	193	=	195	=	380
207	=	221	=	—	=	—
208	=	223	=	—	=	—
210	=	174	=	242	=	—
213	=	211	=	183	=	623
217	=	—	=	—	=	—
220	=	255	=	237	=	639
221	=	169	=	239	=	630
224	=	172	=	238	=	707
226	=	147	=	155	=	400
228 (F.B.)	=	149	=	177	=	369
234	=	—	=	339	=	—

(1959) 1 M.L.J.		72 L.W.		(1959) M.W.N.		I.L.R. (1959) Mad.
235	=	71 L.W. 679	=	(1958) M.W.N. 732	=	—
240	=	—	=	—	=	—
244	=	—	=	—	=	—
246	=	—	=	64	=	—
253	=	222	=	302	=	481
254	=	—	=	247	=	—
256	=	—	=	281	=	—
261	=	293	=	301	=	—
263	=	256	=	405	=	—
265	=	—	=	100	=	—
269 (F.B.)	=	71 L.W. 795	=	17	=	106
278	=	232	=	397	=	475
282	=	337	=	406	=	—
285	=	332	=	430	=	—
287	=	260	=	400	=	705
288	=	340	=	432	=	—
289	=	268	=	403	=	726
291	=	—	=	—	=	—
292	=	459	=	429	=	—
294	=	295	=	313	=	—
297	=	312	=	312	=	—
298	=	299	=	335	=	692
301	=	265	=	382	=	796
304	=	298	=	488	=	823
305	=	24	=	—	=	—
307	=	—	=	—	=	—
309	=	313	=	310	=	802
312	=	140	=	207	=	711
314	=	358	=	353	=	—
318	=	307	=	340	=	697
323	=	167	=	253	=	—
326	=	334	=	322	=	—
329 (F.B.)	=	325	=	331	=	546
333	=	—	=	—	=	—
335	=	270	=	—	=	601
346	=	—	=	—	=	—
348	=	—	=	385	=	—
351	=	316	=	—	=	—
355	=	—	=	—	=	—
359	=	71 L.W. 750	=	(1958) M.W.N. 645	=	—

(1959) 2 M.L.J.		72 L.W.		(1959) M.W.N.		I.L.R. (1959) Mad.
1	=	474	=	303	=	641
8	=	—	=	337	=	877
11	=	—	=	75	=	—
15	=	—	=	—	=	—
29	=	—	=	—	=	—
35	=	104	=	—	=	222
49	=	111	=	161	=	418
61	=	74	=	57	=	320
69	=	261	=	—	=	788
74	=	71 L.W. 606	=	(1958) M.W.N. 527	=	(1958) Mad. 1066
78	=	—	=	—	=	391
83	=	—	=	—	=	—
92	=	429	=	—	=	906
97	=	446	=	325	=	750
104	=	302	=	296	=	681
109 (F.B.)	=	391	=	—	=	730
116	=	—	=	368	=	—
118	=	472	=	376	=	901
120	=	—	=	—	=	—
122	=	424	=	418	=	883
127	=	461	=	485	=	—
131	=	423	=	512	=	824
132	=	—	=	409	=	—
135	=	379	=	—	=	—
136	=	—	=	—	=	—

(1959) 2 M.L.J.		72 L.W.		(1959) M.W.N.		I.L.R. (1959) Mad.
141	=	—	=	441	=	—
148	=	—	=	—	=	—
152	=	453	=	422	=	969
158	=	—	=	—	=	(1958) Mad. 1086
165	=	—	=	—	=	—
173	=	386	=	—	=	891
178	=	398	=	348	=	740
184	=	—	=	—	=	—
186	=	351	=	401	=	807
189	=	245	=	286	=	592
194	=	—	=	108	=	—
196	=	—	=	637	=	—
201	=	—	=	—	=	—
204	=	96	=	—	=	271
208	=	—	=	(1958) M.W.N. 555	=	—
212	=	138	=	245	=	—
215	=	494	=	547	=	—
218	=	—	=	345	=	—
222	=	420	=	427	=	1056
225 (F.B.)	=	543	=	503	=	929
235	=	567	=	—	=	—
236	=	497	=	—	=	—
240	=	519	=	544	=	—
244	=	160	=	186	=	463
254 (F.B.)	=	505	=	496	=	915
262	=	—	=	—	=	205
272	=	487	=	—	=	—
279	=	—	=	—	=	—
284	=	415	=	455	=	—
285	=	—	=	—	=	—
289	=	—	=	447	=	—
294	=	603	=	513	=	827
300	=	354	=	369	=	762
308	=	410	=	—	=	850
314	=	416	=	451	=	978
318	=	403	=	412	=	838
324	=	—	=	258	=	552
339	=	531	=	532	=	1086
344	=	536	=	—	=	1073
351	=	71 L.W. 773	=	—	=	153
358	=	71 L.W. 824	=	—	=	121
365	=	464	=	489	=	—
373	=	69	=	122	=	439
378	=	—	=	—	=	410
383	=	—	=	—	=	—
387	=	596	=	550	=	1014
391	=	595	=	—	=	1030
393	=	577	=	537	=	—
396	=	—	=	290	=	669
402	=	434	=	387	=	770
413	=	—	=	608	=	—
415	=	—	=	—	=	—
417	=	639	=	—	=	—
418	=	721	=	683	=	—
420	=	—	=	568	=	—
422	=	553	=	—	=	985
424	=	—	=	—	=	—
429	=	—	=	—	=	—
434	=	214	=	270	=	—
437	=	—	=	—	=	—
440	=	680	=	—	=	—
443	=	643	=	605	=	—
446	=	—	=	729	=	—
451	=	673	=	—	=	—
454	=	—	=	—	=	—
455	=	790	=	—	=	—
463	=	623	=	576	=	—
466	=	621	=	566	=	—
467	=	741	=	626	=	—
469	=	711	=	553	=	997
479	=	556	=	518	=	939
490	=	788	=	623	=	—

(1959) 2 M.L.J.		72 L.W.		(1959) M.W.N.		I.L.R. (1959) Mad.
492	=	482	=	—	=	—
493	=	501	=	—	=	—
498	=	—	=	—	=	—
502	=	206	=	—	=	—
506	=	—	=	—	=	—
512	=	740	=	625	=	—
513	=	767	=	—	=	—
516	=	687	=	616	=	—
521 (F.B.)	=	697	=	665	=	—
534	=	625	=	583	=	990
538	=	575	=	578	=	—
540	=	—	=	580	=	—
541	=	619	=	582	=	—
542	=	600	=	—	=	—
545	=	380	=	356	=	812
551	=	—	=	695	=	—
555	=	734	=	—	=	—

I.L.R. (1959) Mad.		M.L.J.		
1	=	(1958)	2	421
5	=	(1958)	2	268
9	=	(1958)	2	275
12	=	(1959)	1	71
69	=	(1958)	2	374
74	=	(1959)	1	53
86	=	(1958)	2	437
90	=	(1958)	2	442
97 (F.B.)	=	(1958)	2	568
106 (F.B.)	=	(1959)	1	269
121	=	(1959)	2	358
133	=	(1958)	2	403
139	=	(1958)	2	612
145	=	(1958)	2	461
149	=	(1958)	2	561
153	=	(1959)	2	351
166	=	(1958)	2	407
168	=	(1958)	2	395
172	=	(1959)	1	114
176	=	(1958)	2	552
181	=	(1958)	2	563
187	=	(1959)	1	32
198	=	(1958)	2	28
205	=	(1959)	2	262
222	=	(1958)	2	35
245	=	(1959)	1	60
252	=	(1958)	2	536
256		—		
271	=	(1959)	2	204
278 (F.B.)	=	(1959)	1	171
281	=	(1959)	1	153
285	=	(1959)	1	38
298	=	—		
320	=	(1959)	2	61
331	=	(1959)	1	111
336	=	(1959)	2	181
345	=	(1958)	1	606
349	=	(1959)	1	146
353	=	—		
363	=	—		
369 (F.B.)	=	(1959)	1	228
380	=	(1959)	1	201
391	=	(1959)	2	78
400	=	(1959)	1	226
410	=	(1959)	2	378
418	=	(1959)	2	49
432	=	(1959)	1	168
436	=	(1959)	1	118
439	=	(1959)	2	373

I.L.R. (1959) Mad.		M.L.J.		
449	=	(1959)	1	19
452	=	—		
460	=	(1959)	1	151
463	=	(1959)	2	244
475	=	(1959)	1	278
481	=	(1959)	1	253
484	=	—		
546 (F.B.)	=	(1959)	1	329
552	=	(1959)	2	324
576	=	—		
592	=	(1959)	2	189
601	=	(1959)	1	335
620	=	(1959)	1	193
623	=	(1959)	1	213
630	=	(1959)	1	221
634	=	—		
639	=	(1959)	1	220
641	=	(1959)	2	1
654	=	—		
669	=	(1959)	2	396
681	=	(1959)	2	104
692	=	(1959)	1	298
697	=	(1959)	1	318
705	=	(1959)	1	287
707	=	(1959)	1	224
711	=	(1959)	1	312
715	=	—		
726	=	(1959)	1	289
730 (F.B.)	=	(1959)	2	109
740	=	(1959)	2	178
750	=	(1959)	2	97
762	=	(1959)	2	300
770	=	(1959)	2	402
788	=	(1959)	2	69
796	=	(1959)	1	301
802	=	(1959)	2	309
807	=	(1959)	2	186
812	=	(1959)	2	545
823	=	(1959)	1	304
824	=	(1959)	2	131
827	=	(1959)	2	294
838	=	(1959)	2	318
850	=	(1959)	2	308
859	=	—		
877	=	(1959)	2	8
883	=	(1959)	2	122
891	=	(1959)	2	173
901	=	(1959)	2	118
906	=	(1959)	2	92

I.L.R. (1959) Mad.		M.L.J.		
915 (F.B.)	=	(1959)	2	254
929 (F.B.)	=	(1959)	2	225
939	=	(1959)	2	479
958	=	—		
969	=	(1959)	2	152
978	=	(1959)	2	314
985	=	(1959)	2	422
990	=	(1959)	2	534
997	=	(1959)	2	469
1014	=	(1959)	2	387
1022	=	—		
1030	=	(1959)	2	391
1032	=	(1960)	1	12
1046	=	—		
1056	=	(1959)	2	222
1061	=	—		
1073	=	(1959)	2	344
1086	=	(1959)	2	339

72 L.W.	=	M.L.J.		
1	=	(1958)	2	585
6	=	(1959)	1	38
13	=	(1959)	1	32
19	=	—		
22	=	—		
24	=	(1959)	1	305
26	=	—		
36	=	—		
41	=	—		
46 (F.B.)	=	(1959)	1	171
47	=	(1958)	2	519
55	=	—		
59	=	(1959)	1	181
65	=	(1959)	1	146
66	=	(1958)	2	606
69	=	(1959)	2	373
74	=	(1959)	2	61
80	=	—		
90	=	(1959)	1	173
92	=	(1959)	2	143
93	=	(1959)	2	176
96	=	(1959)	2	204
100	=	(1959)	1	60
104	=	(1959)	2	35
117	=	(1959)	2	49
126	=	(1959)	1	108
127	=	(1958)	2	594
129	=	(1959)	1	149
131	=	(1959)	2	28
135	=	(1969)	2	193
136	=	(1959)	2	151
138	=	(1959)	2	212
140	=	(1959)	1	312
142	=	(1959)	2	19
144		—		
147	=	(1959)	1	226
149 (F.B.)	=	(1959)	2	228
155	=	(1959)	2	185
160	=	(1959)	2	244
167	=	(1959)	1	323
169	=	(1959)	2	221
172	=	(1959)	2	224
174	=	(1959)	2	210
177	=	(1958)	2	442
180	=	—		
193	=	(1959)	1	201
199	=	—		
206	=	(1959)	2	502
211	=	(1959)	1	213
214	=	(1959)	2	434

72 L.W.		M.L.J.		
218	=	—		
221	=	(1959)	1	207
222	=	(1959)	1	253
223	=	(1959)	1	208
225	=	—		
232	=	(1959)	1	278
235	=	—		
244	=	—		
245	=	(1959)	2	189
249	=	—		
253	=	(1959)	1	168
255	=	(1959)	2	220
256	=	(1959)	2	263
257	=	(1959)	2	22
260	=	(1959)	2	282
262	=	(1959)	2	69
265	=	(1959)	1	301
268	=	(1959)	2	287
270	=	(1959)	2	335
281	=	(1958)	2	596
285	=	—		
293	=	(1959)	1	261
295	=	(1959)	1	294
298	=	(1959)	1	304
299	=	(1959)	1	298
302	=	(1959)	1	104
307	=	(1959)	1	318
312	=	(1959)	1	297
313	=	(1959)	1	309
316	=	(1959)	1	351
320	=	—		
325 (F.B.)	=	(1959)	1	329
332	=	(1959)	1	285
334	=	(1959)	1	326
337	=	(1959)	1	282
340	=	(1959)	1	288
341	=	(1959)	1	46
347	=	—		
349	=	—		
351	=	(1959)	2	186
354	=	(1959)	2	300
358	=	(1959)	1	314
361	=	—		
364	=	—		
367	=	—		
371	=	(1959)	1	110
372	=	—		
379	=	(1959)	2	135
380	=	(1959)	2	545
386	=	(1959)	2	173
391 (F.B.)	=	(1959)	2	109
398	=	(1959)	2	178
403	=	(1959)	2	318
410	=	(1959)	2	308
415	=	(1959)	2	284
416	=	(1959)	2	314
420	=	(1959)	2	222
423	=	(1959)	2	131
424	=	(1959)	2	122
429	=	(1959)	2	92
434	=	(1959)	2	402
444	=	—		
445	=	—		
446	=	(1959)	2	97
453	=	(1959)	2	152
459	=	(1959)	1	292
461	=	(1959)	2	127
464	=	(1959)	2	365
472	=	(1959)	2	118
474	=	(1959)	2	1
482	=	(1959)	2	492

72 L.W.		M.L.J.		
483	=	—		
487	=	(1959)	2	272
494	=	(1959)	2	215
497	=	(1959)	2	236
501	=	(1959)	2	493
505 (F.B.)	=	(1959)	2	254
514	=	—		
519	=	(1959)	2	240
522	=	—		
531	=	(1959)	2	339
536	=	(1959)	2	344
543 (F.B.)	=	(1959)	2	225
553	=	(1959)	2	422
556	=	(1959)	2	479
567	=	(1959)	2	235
568	=	—		
572	=	—		
575	=	(1959)	2	538
577	=	(1959)	2	393
580	=	—		
585	=	—		
595	=	(1959)	2	391
596	=	(1959)	2	387
600	=	(1959)	2	542
603	=	(1959)	2	294
609	=	—		
619	=	(1959)	2	541
620	=	—		
621	=	(1959)	2	466
623	=	(1959)	2	463
625	=	(1959)	2	434
628	=	—		
633	=	—		
639	=	(1959)	2	417
640		—		
643	=	(1959)	2	443
646		—		
650		—		
651		—		
656		—		
660		—		
665	=	(1958)	2	561
666		—		
669		—		
671	=	(1959)	2	118
673	=	(1959)	2	451
676		—		
680	=	(1959)	2	440
683		—		
687	=	(1959)	2	516
691		—		
697 (F.B.)	=	(1959)	2	521
711	=	(1959)	2	469
721	=	(1959)	2	418
723		—		
726		—		
731		—		
734	=	(1959)	2	555
740	=	(1959)	2	512
741	=	(1959)	2	467
742		—		
747		—		
752		—		
764		—		
767	=	(1959)	2	513
770		—		
778		—		
782		—		
786		—		
788	=	(1959)	2	490

72 L.W.		M.L.J.		
790	=	(1959)	2	455
799	=	—		
804	=	—		
806	=	—		
807	=	—		
809	=	—		

1959 M.W.N.		M.L.J.		
1 (F.B.)	=	(1959)	1	1
17 (F.B.)	=	(1959)	1	269
24	=	(1959)	1	195
30	=	(1959)	1	25
32	=	—		
34	=	(1959)	1	151
36 (F.B.)	=	(1959)	1	171
37	=	—		
42	=	(1958)	2	555
44	=	(1959)	1	181
48	=	(1959)	1	110
49	=	(1959)	1	125
57	=	(1959)	1	61
64	=	(1959)	1	246
69	=	(1959)	1	46
75	=	(1959)	2	11
77	=	(1959)	1	144
79	=	—		
80	=	(1959)	1	143
81	=	(1958)	2	557
83	=	(1959)	1	114
85	=	(1958)	2	617
87	=	(1959)	1	178
89	=	(1959)	1	106
91	=	(1959)	1	153
94	=	(1959)	1	111
97	=	(1958)	2	61
100	=	(1959)	1	265
104	=	—		
108	=	(1959)	2	194
110	=	(1959)	1	120
111	=	—		
112	=	(1959)	1	105
113	=	—		
122	=	(1959)	2	373
127	=	—		
131	=	(1959)	1	189
135	=	(1959)	1	176
137	=	(1959)	1	116
138	=	—		
149	=	(1959)	1	157
152	=	—		
155	=	(1959)	1	226
159	=	—		
161	=	(1959)	2	49
171	=	—		
177 (F.B.)	=	(1959)	1	228
183	=	(1959)	1	213
186	=	(1959)	2	244
195	=	(1959)	1	201
201	=	(1959)	1	53
207	=	(1959)	1	312
208	=	(1959)	1	122
209	=	—		
215	=	—		
222	=	—		
227	=	—		
229	=	—		
232	=	(1959)	1	193
233	=	(1959)	1	185

1959 M.W.N.		M.L.J.		
237	=	(1959)	1	220
238	=	(1959)	1	224
239	=	(1959)	1	221
241	=	—		
242	=	(1959)	1	210
245	=	(1959)	2	12
247	=	(1959)	1	254
248	=	(1959)	1	173
251	=	(1959)	1	22
253	=	(1959)	1	323
255	=	(1958)	2	403
258	=	(1959)	2	324
270	=	(1959)	2	434
273	=	—		
276	=	—		
281	=	(1959)	1	256
286	=	(1959)	2	189
290	=	(1959)	1	396
296	=	(1959)	2	104
301	=	(1959)	1	261
302	=	(1959)	1	253
303	=	(1959)	2	1
310	=	(1959)	1	309
312	=	(1959)	1	297
313	=	(1959)	1	294
316	=	—		
322	=	(1959)	1	326
325	=	(1959)	2	97
331	=	(1959)	1	239
335	=	(1959)	1	298
337	=	(1959)	2	8
339	=	(1959)	1	234
340	=	(1959)	1	318
345	=	(1959)	2	218
348	=	(1959)	2	178
353	=	(1959)	1	314
356	=	(1959)	2	545
361	=	—		
362	=	—		
366	=	—		
367	=	(1958)	2	619
368	=	(1959)	2	116
369	=	(1959)	2	300
376	=	(1959)	2	118
378	=	—		
382	=	(1959)	1	301
385	=	(1959)	1	348
387	=	(1959)	2	402
397	=	(1959)	1	278
400	=	(1959)	1	287
401	=	(1959)	2	186
403	=	(1959)	1	289
405	=	(1959)	1	263
406	=	(1959)	1	282
409	=	(1959)	2	132
411	=	—		
412	=	(1959)	2	318
418	=	(1959)	2	122
422	=	(1959)	2	152
427	=	(1959)	2	222
429	=	(1959)	1	292
430	=	(1959)	1	285
432	=	(1959)	1	288
433	=	—		
441	=	(1959)	2	141
447	=	(1959)	2	289
451	=	(1959)	2	314
455	=	(1959)	2	284
456	=	—		
461	=	—		
465	=	—		

1959 M.W.N.		M.L.J.		
469	=	—		
473	=	—		
481	=	—		
485	=	(1959)	2	127
488	=	(1959)	1	304
489	=	(1959)	2	365
496 (F.B.)	=	(1959)	2	254
503 (F.B.)	=	(1959)	2	225
512	=	(1959)	2	131
513	=	(1959)	2	294
518	=	(1959)	2	479
528	=	—		
532	=	(1959)	2	339
537	=	(1959)	2	393
539	=	—		
544	=	(1959)	2	240
547	=	(1959)	2	215
550	=	(1959)	2	387
553	=	(1959)	2	469
562	=	—		
566	=	(1959)	2	466
568	=	(1959)	2	420
569	=	(1960)	1	12
576	=	(1959)	2	463
578	=	(1959)	2	538
580	=	(1959)	2	540
581	=	—		
582	=	(1959)	2	541
583	=	(1959)	2	534
585	=	—		
590	=	—		
597 (1)	=	—		
597 (2)	=	—		
599	=	—		
601	=	—		
605	=	(1959)	2	443
608	=	(1959)	2	413
609	=	—		
610	=	—		
616	=	(1959)	2	516
620	=	—		
623	=	(1959)	2	490
625	=	(1959)	2	512
626	=	(1959)	2	467
627	=	—		
630	=	—		
631	=	—		
632	=	—		
635	=	—		
637	=	—		
638	=	—		
642	=	—		
648	=	—		
649	=	—		
656	=	—		
662	=	—		
663	=	—		
665 (F.B.)	=	(1959)	2	521
676	=	—		
681	=	—		
683	=	(1959)	2	418
685	=	—		
688	=	—		
695	=	(1959)	2	551
698	=	—		
702	=	—		
703	=	—		
706	=	—		
707	=	—		
708	=	—		

1959 M.W.N.		M.L.J.	1959 M.W.N.		M.L.J.	
716	=	—	726	=	—	
719	=	—	729	=	(1959) 2	446
723	=	—	734	=	—	